

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**DUSTIN G LITTLE**

Claimant

**APPEAL NO. 16A-UI-03907-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MONARCH INVESTMENTS LLC**

Employer

**OC: 02/28/16**

**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 23, 2016, reference 01, decision that allowed benefits to the claimant, provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on February 29, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on April 19, 2016. Claimant Dustin Little participated. Melissa Hill of Labor Consultants/Employers Edge represented the employer and presented testimony through Karen Hinds and Kim Wauters. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits Two, Three, Four and Six through 10 into evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Monarch Investments, L.L.C., owns Gray's Lake Apartments in Des Moines. The complex has 304 units in eight buildings. Dustin Little was employed as a full-time maintenance tech at the Gray's Lake complex from March 2015 until February 29, 2016, when Karen Hinds, Property Manager, and Mike Brown, Maintenance Supervisor, discharged him from the employment. Ms. Hinds and Mr. Brown both began their employment after Mr. Little began his. Ms. Hinds started with the company in September 2015 and became Mr. Little's supervisor at that time. Mr. Brown began his employment in October 2015 and transitioned into supervising Mr. Little's day-to-day work. Mr. Little's regular work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. In addition, the employer required that Mr. Little be on call for after-hours service calls for a week at a time.

The two final incidents that triggered the discharge occurred on February 23, 2016 and February 25, 2016. On February 23, Mr. Little was helping to orient a new maintenance tech, Alex Starrett. In the course of discussing work duties, Mr. Little mentioned that the employer had a groundskeeper who picks up 90 percent of the trash. The employer alleges that Mr. Little told Mr. Starrett to ignore trash and leave it for the groundskeeper. The employer further alleges that Mr. Little made disparaging remarks to Mr. Starrett regarding a coworker and about the employer. Mr. Little denies the employer's allegations and asserts that Mr. Starrett misconstrued his comments. The second final incident that triggered the discharge concerned Mr. Little's work to install a dishwasher on February 25, 2016. When Mr. Little went to install the dishwasher, he encountered a water supply connector set-up that he had not encountered before. Mr. Little did not have a connector piece that he needed to perform the installation. The apartment where Mr. Little was working at the time was not near the maintenance shop. Pursuant to normal practices, Mr. Little took a photograph of the connection with his cell phone and sent the photo to Mr. Brown, who was in or near the maintenance shop. Mr. Brown located the needed part, brought it to Mr. Little, and Mr. Little completed the installation. On February 29, 2016, Ms. Hinds and Kim Wauters, Assistant Regional Manager, met with Mr. Little to discharge him from the employment for failing "to consistently adhere to Monarch policies ... and to consistently meet Monarch's performance expectations."

The next most recent conduct that factored in the discharge occurred during the period of February 4-9, 2016 and came to the employer's attention during that period. On February 12, 2016, Ms. Hinds issued a written reprimand based on events during the period of February 4-9, 2016. The employer had recently instituted a requirement that Mr. Little clock in and out when he responded to after-hours service calls. During the weekend that included Saturday, February 6, and Sunday, February 7, Mr. Little clocked in when responding to one after-hours call for service, but forgot to clock in for the other. Mr. Little was ill at the time, but responded to the after-hours calls for service nonetheless. At 1:30 a.m. on Sunday, February 7, Mr. Little received a call from a tenant who reported that someone was running around trying to kick in doors and that the lock on the tenant's front door was broken. When the tenant asked Mr. Little what she should do, Mr. Little directed the tenant to summon the police. Mr. Little was concerned for his safety and, therefore, did not immediately report to the tenant's apartment. Mr. Little reported to the tenant's apartment when the police arrived and repaired the door lock. Later in the day on February 7, Mr. Little responded to an after-hours call for service from a tenant who lacked hot water to the tenant's bathtub. Mr. Little was not feeling well and asked the tenant whether it would be okay if he fixed the tub the next day, Monday. The tenant acquiesced. Mr. Little did not document the call for service and then was absent due to illness on Monday, February 8 and Tuesday, February 9. Because Mr. Little had not logged the call for service so Mr. Brown or Ms. Hinds would be aware of it, the tenant's tub did not get repaired until Mr. Little returned to work on Wednesday, February 10. If Mr. Little needed to be absent, he was required to call Ms. Hinds at least an hour prior to his shift. Mr. Little followed the procedure regarding his absence on February 8, but waited until afternoon to call Ms. Hinds on February 9.

In November 2015, Ms. Hinds reprimanded Mr. Little for complaining to Ms. Wauters about Ms. Hinds' directive regarding the on-call duty rotation. At that point, Mr. Brown had been with the employer for a few weeks. Mr. Little thought it was unfair that Mr. Brown, the maintenance supervisor, was not required to rotate through the week-long on-call duties. A short while after Ms. Hinds told Mr. Little that she would decide when Mr. Brown joined the on-call rotation, Mr. Little went to Ms. Wauters' office and complained that the on-call rotation was unfair. Ms. Wauters was Ms. Hinds' immediate supervisor.

In making the discharge decision, Ms. Hinds considered additional reprimands issued to Mr. Little by the prior Property Manager.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on

which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record fails to establish a current act of misconduct. The final two incidents that triggered the February 29, 2016 discharge date from February 23 and 25, 2016. The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with either allegation. The employer had the ability to present testimony through Mr. Starrett and/or Mr. Brown, but elected not to present such testimony. The employer failed to present sufficient evidence to rebut Mr. Little's testimony regarding the reasonable steps he took to resolve the non-standard dishwasher installation or to rebut his testimony that Mr. Starrett misconstrued his comments. The next most recent conduct that factored in the discharge dates from February 9 and earlier and came to the employer's attention during that period. None of that conduct constituted a current act at the time of discharge and cannot serve as a basis for disqualifying Mr. Little from the employment. Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Little was discharged for no disqualifying reason. Accordingly, Mr. Little is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

#### **DECISION:**

The March 23, 2016, reference 01, decision is affirmed. The claimant was discharged on February 29, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs