

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN J MARKHAM
Claimant

APPEAL NO. 16A-UI-13521-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXIDE TECHNOLOGIES
Employer

**OC: 11/27/16
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Kevin Markham filed a timely appeal from the December 14, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on a claims deputy's conclusion that Mr. Markham had been discharged on November 29, 2016 for failure to follow instructions in the performance of his job. After due notice was issued, a hearing was held on January 12, 2017. Mr. Markham participated. Fred Gilbert, Human Resources Manager, represented the employer and presented additional testimony through Darryl Eggers, Plant Superintendent. Exhibits 1 through 6 and 9 were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kevin Markham was employed by Exide Technologies as a full-time pasting machine operator from 1983 until November 29, 2016, when Darryl Eggers, Plant Superintendent, discharged him from the employment for failing to perform the required number of quality control checks. The employer's manufacturing process and Mr. Markham's work duties included hourly quality control checks to make certain that the lead oxide paste was being applied to gridded plates was being applied in the correct thickness and correct weight. Mr. Markham's duties also included monitoring the production line as it produced 25,000 pasted plates per hour.

The quality control check process involved multiple steps. First, Mr. Markham would have to select three plates from each side of the production line he was assigned to monitor. Mr. Markham then had to place the six plates in the drying ovens. It would take 10 minutes for a drying oven to dry a gridded plate so that Mr. Markham could continue on with the next step of the quality check process. The drying oven held four plates. Accordingly, Mr. Markham would have to use two drying ovens to dry all six plates. The drying ovens were frequently not available when Mr. Markham needed them because three or four other pasting machine

operators would also be performing their hourly quality checks. Earlier in the employment, the employer had three drying ovens. During at least the last couple years of the employment, the employer had only two drying ovens. Mr. Markham and other pasting machine operators had expressed concern about the lack of oven space. After the gridded plates were dry, Mr. Markham had to measure the thickness of the plate and weigh the plate. After that, Mr. Markham had to knock the lead oxide paste off the plates and then weigh the empty plates to ascertain the weight of the lead oxide being applied during the manufacturing process. Mr. Markham was then required to enter data from the quality check process into employer's computer system.

When the employer discharged Mr. Markham from the employment, the employer looked that the most three months and concluded that Mr. Markham was refusing to complete the required number of quality checks. However due to the limited number of drying machines and the number of pasting machine operators who needed to use those machines, it was frequently impossible for Mr. Markham to complete eight quality checks during his shift. In addition, Mr. Markham's pasting machine would at times be inoperable for part of a shift and this, too, would make it impossible for Mr. Markham to complete eight quality checks during his shift. The weight of the evidence indicates that the employer did not take these factors into consideration. Though the employer asserts that other pasting operators were consistently able to complete to complete eight quality checks during a shift, the weight of the evidence indicates that simply would not be possible.

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 weight of the evidence in the record establishes that Mr. Markham performed his duties in good faith and to the best of his ability, but not to the satisfaction of the employer. The evidence fails to support the employer's assertion that Mr. Markham refused to perform the work as directed or that he exhibited a pattern of carelessness or negligence that indicated a willful disregard of the employer's interests. Mr. Markham's inability to perform to the employer's satisfaction did not constitute misconduct in connection with employment and the discharge would not disqualify him for unemployment insurance benefits. Mr. Markham is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 14, 2016, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs