

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EDUARDO CONTRERAS**

Claimant

**APPEAL NO. 12A-UI-11631-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABSOLUTE CONCRETE CONSTRUCTION**

Employer

**OC: 01/08/12**

**Claimant: Appellant (1)**

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

871 IAC 26.8(5) – Decision on the Record

**STATEMENT OF THE CASE:**

Eduardo Contreras filed a timely appeal from the September 21, 2012, reference 01, decision that denied benefits. A telephone hearing was scheduled for October 23, 2012. Mr. Contreras did not respond to the hearing notice instructions and did not participate in the hearing. Matt Triggs, chief operating officer, represented the employer.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Eduardo Contreras was employed by Absolute Concrete Construction, Inc., as a full-time laborer from 2010 until August 30, 2012, when the employer discharged him from the employment. Brian Doser, superintendent, was Mr. Contreras' immediate supervisor.

The final incident that triggered the discharge occurred on August 29, 2012, when Mr. Contreras returned to lunch and did not have on required safety equipment. Mr. Contreras tried to return to work without his work boots or his safety vest. Mr. Contreras was aware that safety equipment was required when working on the job site. When Mr. Doser directed Mr. Contreras to get his safety equipment on, Mr. Contreras became argumentative. Mr. Contreras tried to provoke Mr. Doser into hitting him and said, "Hit me, hit me." Mr. Doser and others were able to get Mr. Contreras calmed down. The employer then sent Mr. Contreras home for the rest of the day. After further considering the incident, the employer discharged Mr. Contreras the next day.

The employer took other matters into consideration when making the decision to discharge Mr. Contreras from the employment. A couple weeks before the discharge, Matt Triggs, chief operating officer, met with the 12-person crew to discuss the good year the company was having and to announce across-the-board raises. That day, Mr. Contreras initially called in an absence and cited lack of gasoline. Mr. Contreras was persuaded to show up for work, but then

showed up a few hours late. During Mr. Triggs' discussion with the crew, Mr. Contreras became disruptive.

In making the decision to discharge Mr. Contreras from the employment, the employer also took into consideration a concerned citizen complaint from July 2012. The concerned citizen alleged that Mr. Contreras had been speeding in the company truck. In the response to the complaint, the employer moved forward with planned installation of GPS devices in its company trucks.

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

Iowa Code section 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.

871 IAC 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.

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).

The events of August 29, 2012, were sufficient to establish misconduct in connection with the employment. On that day, Mr. Contreras intentionally failed to wear required safety gear when he returned to the job site after lunch. Mr. Contreras then refused to comply with Mr. Doser's directive to put on the safety gear. Mr. Contreras then attempted to provoke an altercation between himself and Mr. Doser. Mr. Contreras is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

**DECISION:**

The Agency representative's September 21, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw