

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS M IHDE
Claimant

APPEAL NO. 10A-UI-02385-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRIORITY COURIER INC
Employer

OC: 01/03/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Douglas Ihde filed a timely appeal from the February 8, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 25, 2010. Mr. Ihde participated personally and was represented by attorney Rod Kleitsch. Tim Deweerdt, Terminal Manager, represented the employer and presented additional testimony through Nancy Stoneking, Fred Anderson, Dennis Giesler and Andy English. Exhibits One through Ten 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: Douglas Ihde was employed by Priority Courier, Inc., as a full-time delivery driver from January 2008 until October 27, 2009, when Tim Deweerdt, Terminal Manager, and Dock Supervisors Dennis Giesler and Andy English discharged him from the employment. Mr. Giesler and Mr. English were Mr. Ihde's immediate supervisors.

The final incident that triggered the discharge occurred on October 18, 2009 and came to Mr. Deweerdt's attention the next day. At the end of the day on October 18, Nancy Stoneking, Billing Clerk, thought she smelled alcohol on Mr. Ihde's breath as he was turning in some paperwork. Ms. Stoneking does not drink alcohol and cannot say what type of alcoholic beverage she allegedly smelled. Ms. Stoneking did not observe anything about Mr. Ihde's behavior that indicated he was under the influence of alcohol or a controlled substance. Ms. Stoneking has no training in discerning whether a person is under the influence of alcohol or a controlled substance. The employer has a written drug testing policy, but did not follow that policy to address Ms. Stoneking's concern.

In making the decision to discharge Mr. Ihde the employer considered the time it took for Mr. Ihde to load his truck at the beginning of the work day and time it took for him to process

paperwork at the end of the day. The employer believed Mr. Ihde took too long. At the beginning of the employment, Mr. Ihde had shared a route, along with loading and paperwork duties, with another driver. The loading and paperwork took longer once Mr. Ihde became the sole driver on the route. Though the route had been pared down somewhat, Mr. Ihde still had to do more work as the sole driver than he had done when he shared the route.

In making the decision to discharge Mr. Ihde, the employer also considered an offensive outburst Mr. Ihde had directed at Mr. English in August 2009.

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).

There is insufficient evidence in the record to establish, by a preponderance of the evidence, that Mr. Ihde had been drinking alcohol on duty or was under the influence of alcohol on October 18, 2009. There is insufficient evidence in the record to establish misconduct in connection with the employer’s concerns about the time it took Mr. Ihde to perform his duties. The weight of the evidence indicates it took Mr. Ihde more time at the end of the employment than at the start because there was more work for him to do. With regard to the outburst in August, that incident no longer constituted a “current act” at the time of the discharge and, in the absence of some other “current act” of misconduct, cannot serve as the basis for disqualifying Mr. Ihde for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ihde was discharged for no disqualifying reason. Accordingly, Mr. Ihde is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Ihde.

DECISION:

The Agency representative’s February 8, 2010, 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

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