

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW J GORDON
Claimant

APPEAL NO. 10A-UI-11412-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JOSEPH L ERTL INC
Employer

OC: 07/04/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 2, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 30,, 2010. Claimant participated personally and was represented by Attorney Natalia Blaskovich. Ms. Blaskovich presented testimony through the claimant and through witness Nate Clemen. Jane McClean represented the employer and presented additional testimony through Bill Sauser and Deb Fangmann. Exhibits Three through Six 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: Matthew Gordon was employed by Joseph L. Ertl, Inc., as a full-time machine operator from 2005 until July 2, 2010, when Jane McClean, Vice President, and Bill Sauser, Department Manager, discharged him for alleged unauthorized use of a motorized maintenance cart. Mr. Gordon's immediate supervisor for the last two months of the employment was Brad Sauser. Brad Sauser was new to the company. Brad Sauser is Bill Sauser's son. Mr. Gordon was assigned to the second shift. At the end of the employment, the employer did not have a maintenance person assigned to the second shift. Brad Sauser and the other machine operators on the second shift frequently enlisted Mr. Gordon to fulfill troubleshooting and machine repair duties that would otherwise have been performed by maintenance personnel. The motorized maintenance cart was to be used for maintenance purposes only. Mr. Gordon used the maintenance cart when he was performing maintenance duties or when he was looking for Brad Sauser in connection with performing maintenance duties. Brad Sauser often went missing during the second shift and, at those times, could usually be located in a parking lot talking to his girlfriend.

The employer's decision to discharge Mr. Gordon on July 2 followed *other* employees' unauthorized use of the maintenance cart during second shift on July 1. Those *other*

employees had caused damage to a break room area through their unauthorized use of the maintenance cart. Mr. Gordon was not involved in that incident. The employer, in the course of investigating that unauthorized use that resulted in damage, observed Mr. Gordon operating the maintenance cart at other times during the shift. The employer concluded this was unauthorized use of the maintenance cart and proceeded with discharging Mr. Gordon from the employment.

In making the decision to discharge Mr. Gordon from the employment, employer considered one or more prior incidents, the most recent of which occurred on June 7, 2010. On that date, Mr. Gordon needed to move a machine cart out-of-the-way to perform his duties. The machine cart was in the vicinity of a ramp leading out of the building. When Mr. Gordon moved the cart, which weighed 300 pounds, the cart started down the ramp leading out of the building. Mr. Gordon could not stop the cart. The cart ended up several feet outside the building on its side. The incident happened during the early hours of morning. Given that it was dark, and given that Mr. Gordon lacked the means to right the cart and get it back into the facility, Mr. Gordon left the cart where it landed.

Mr. Gordon's discharge from the employment occurred in the context of friction between Mr. Gordon and the employer. The friction appears to date back to a hand injury Mr. Gordon had suffered in the course of performing his work duties. The friction appeared to center on the employer's belief that Mr. Gordon was overly cautious and took too long to perform his assigned duties after the injury.

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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the final incident that triggered the discharge or in connection with the next most recent incident on June 7, 2010. The administrative law judge notes that the employer had the ability to present testimony through Brad Sauser and elected not to do that. The administrative law judge notes that employer had the ability to present testimony through employee Mike Gulrud with regard to the June 7 incident and elected not to do that. The weight of the evidence in the record indicates that Mr. Gordon was discharged for operating the motorized maintenance cart on July 1, 2010 as he performed maintenance related duties. The weight of the evidence indicates that Mr. Gordon reasonably concluded he had proper authorization to use the cart for those purposes or to locate Brad Sauser. In any event, there is no indication that Mr. Gordon's operation of the maintenance cart was in willful or wanton disregard of the employer's interests. Accordingly the incident did not involve misconduct that would disqualify Mr. Gordon for unemployment insurance benefits. Likewise, the evidence fails to support the employer's allegation that Mr. Gordon pushed a cart on June 7 out of anger or any other willful or wanton disregard of the employer's interests.

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

DECISION:

The Agency representative's August 2, 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

jet/css