

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL R MUNDELL**  
Claimant

**APPEAL NO. 09A-UI-11885-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WINGER CONTRACTING CO**  
Employer

**Original Claim: 07/12/09  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Michael Mundell filed a timely appeal from the August 18, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 2, 2009. Mr. Mundell participated. Attorney Shannon Woods represented the employer.

**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: Michael Mundell was employed by Winger Contracting Company as a full-time electrician's helper from July 2006 until July 14, 2009, when Shane Luck, General Foreman, and John Atkinson, Foreman, discharged him from the employment. Mr. Atkinson was Mr. Mundell's immediate supervisor. Mr. Mundell's normal work hours were 6:00 a.m. to 4:30 p.m., Monday through Thursday. Mr. Mundell was scheduled to take a 15-minute morning break and a 2:30 p.m. break with other employees.

Toward the end of the employment, the employer received complaints from various journeyman electricians to which Mr. Mundell was assigned. The complaints were that Mr. Mundell would disappear for 30 minutes to an hour at a time without explanation. The employer had warned Mr. Mundell about the conduct. The employer suspected that Mr. Mundell was stepping out to make or take calls concerning a side business he operated.

The final incident that prompted the discharge occurred on July 14. At 7:45 a.m., Mr. Mundell walked the quarter mile distance to a supply shop to get some "soap" he needed to run wire through conduit on the job site. On the way back, Mr. Mundell stopped to use the restroom. Mr. Mundell returned to his work area at 8:10 a.m. At 9:00 a.m., Mr. Mundell took break with other employees. When Mr. Mundell returned from break, Mr. Atkinson told him he was discharged.

## 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 any testimony from persons with firsthand knowledge of the events that triggered and factored into the employer's decision to discharge Mr. Mundell from the employment. The employer had the ability to present more direct and satisfactory evidence, but failed to do so. The evidence in the record is insufficient to establish misconduct in connection with the final incident. The employer provided no testimony from persons with firsthand knowledge of the final incident to rebut the testimony Mr. Mundell provided. The employer provided insufficient evidence to establish prior specific acts misconduct.

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

**DECISION:**

The Agency representative's August 18, 2009, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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