

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MOHAMED H MOHAMED

Claimant

APPEAL NO. 17A-UI-04570-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM ONSITE SERVICES MIDWEST INC

Employer

OC: 04/09/17

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Mohamed Mohamed filed a timely appeal from the May 1, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Mohamed was discharged on April 12, 2017 for wanton carelessness in performing his work. After due notice was issued, a hearing was held on June 5, 2017. Mr. Mohamed participated. Malia Maples of Employers Edge represented the employer and presented testimony through Brooke Hupke and Jackie Sciorrotta. Somali-English interpreters Kathra Ahmed and Noor Mie of CTS Language Link assisted with the hearing. Exhibits 1, 3, 4, 6, 8-11, 13, 15, 18-21, 24, 25, 26, 28-34 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: Mohamed Mohamed was employed by ABM Onsite Services Midwest, Inc. as a full-time general cleaner from February 2016 until April 12, 2017, when the employer discharged him from the employment. In November 2016, Mr. Mohamed moved from an overnight work assignment to a day-shift assignment at a Wells Fargo Bank facility in West Des Moines. Mr. Mohamed continued in the new set of duties until he was suspended from the employment on April 6, 2017. Account Manager Jackie Sciorrotta was Mr. Mohamed's immediate supervisor at the Wells Fargo facility. Mr. Mohamed's duties included vacuuming, dusting, emptying garbage cans, and cleaning and dusting window blinds and sills.

The final incident that triggered Mr. Mohamed's suspension and discharge occurred on April 3, 2017. On that morning, Mr. Mohamed knocked over and broke a picture frame on a Wells Fargo employee's desk because he was careless while dusting the employee's desk. Wells Fargo employees were nearby and observed Mr. Mohammed break the frame and then walk away. ABM policy required that Mr. Mohamed report such incidents to his supervisor. Mr. Mohamed did not report the incident to his supervisor. The Wells Fargo employees who observed Mr. Mohamed's conduct reported the incident to the Wells Fargo employee to whom the frame belong when she arrived for work. This was in fact the second time that

Mr. Mohamed had broken a cherished item on the employee's desk while carelessly dusting the desk. The Wells Fargo employee reported this second incident to a supervisor and the supervisor contacted ABM to complain and prompt an investigation. Ms. Sciorrotta and Account Manager Brooke Hupke conducted an investigation into the matter and spoke to those persons with firsthand knowledge of the matter, including Mr. Mohamed. When the employer spoke with Mr. Mohamed on April 7, Mr. Mohamed denied any knowledge or involvement. The employer suspended Mr. Mohamed at that time. The employer subsequently discharged Mr. Mohamed.

The employer considered prior incidents and reprimands for careless and/or negligence when making the decision to discharge Mr. Mohamed from the employment. On March 31, Mr. Mohamed skipped dusting the window sills in his assigned area. Ms. Sciorrotta discovered the extremely dusty sills and took a photo of the dust she was able to swipe through with her hand. The amount of dust indicated the sill had not been cleaned for an extended period. On January 26, another supervisor discovered that Mr. Mohamad was skipping other dusting duties for an extended period.

The employer considered other rule violations in making the decision to discharge Mr. Mohamed from the employment. These concerned use of a cell phone and not storing personal property in the designated storage area.

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).

The weight of the evidence in the record establishes a discharge based on pattern of carelessness and/or negligence and willful disregard of the employer's interests. The weight of the evidence in the record establishes that Mr. Mohamed was indeed careless in performing dusting duties on April 3, 2017, knocked over and broke personal property belong to the Wells Fargo employee, walked away, and failed to report the incident. Mr. Mohamed two recent reprimands for ongoing negligence in performing assigned dusting duties. Mr. Mohamed's pattern of carelessness and negligence demonstrated an intentional and substantial disregard of the employer's interests and constituted misconduct in connection with the employment. Accordingly, Mr. Mohamed is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Mohamed must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The May 1, 2017, reference 01, decision is affirmed. The claimant was discharged on April 12, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs