

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DOMINIC M TOMMINGO**  
Claimant

**RAINING ROSE INC**  
Employer

**APPEAL NO. 19A-UI-07235-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/18/19  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Dominic Tommingo filed a timely appeal from the September 10, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Tommingo was discharged on August 20, 2019 for failure to follow instructions in the performance of his job. After due notice was issued, a hearing was held on October 3, 2019. Mr. Tommingo participated. Nikki Voss represented the employer. Exhibits 1, 2, 3 and A 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: Dominic Tommingo was employed by Raining Rose, Inc. as a full-time Batcher from April 2018 until August 20, 2019, when the employer discharged him for repeated carelessness in the performance of his duties.

The final incident that triggered the discharge occurred on August 18, 2019, when Mr. Tommingo deviated from the employer's established protocol for adding ingredients to make batches of product and added a wrong ingredient to the batch. Mr. Tommingo had been properly trained in the work duties and was at all relevant times able to perform his work duties according to the established protocol. On August 18, failed to scan the ingredient with the hand scanner to make sure he had the correct product. Mr. Tommingo then failed to have a coworker confirm he was adding the correct ingredient to the batch before he adding the ingredient to the batch of product. Mr. Tommingo had similarly deviated from the established protocol on February 24, 2019, when he again failed to scan the ingredient before adding it to the batch. The employer issued a written reprimand to Mr. Tommingo following the February incident and warned of further discipline if the issue reoccurred. In September 2018, Mr. Tommingo had made a similar error, which prompted a non-disciplinary verbal counseling.

The employer considered other incidents when making the decision to discharge Mr. Tommingo from the employment. On August 3, 2019, Mr. Tommingo operated a forklift in the course of performing his work duties. While Mr. Tommingo operated the forklift, the forklift collided with and damaged the concrete base of a holding tank. The employer questioned Mr. Tommingo's judgment in using the forklift for the particular task. On July 19, 2019, Mr. Tommingo operated a power washer to clean a kettle mixer. During that process, a metal piece of the power washer came off and entered the mixer mechanism, prompting the employer to expend significant resources to remove the metal piece. The employer questioned Mr. Tommingo's judgment in using the power washer to clean the inside of the kettle mixer.

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

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The weight of the evidence in the record establishes an August 20, 2019 discharge that was indeed based on a pattern of carelessness sufficient to indicate an intentional and substantial disregard of the employer's interests. The evidence indicates three mixing error attributable to Mr. Tommingo not scanning the ingredient to ensure the correct ingredient was added to the batch of product. The evidence indicates an additional incident of carelessness in connection with operation of the forklift. The power washer incident appears to have been an unfortunate accident arising from a good faith error in judgment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Tommingo was discharged for misconduct. Accordingly, Mr. Tommingo is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Tommingo must meet all other eligibility requirements. The employer's account shall not be charged.

**DECISION:**

The September 10, 2019, reference 01, decision is affirmed. The claimant was discharged on August 20, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs