

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CAREY T SHELP**  
Claimant

**APPEAL NO. 10A-UI-06915-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TCT TRUCKING INC**  
Employer

**Original Claim: 04/11/10  
Claimant: Respondent (5)**

Section 96.5(2)(a) – Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 7, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 28, 2010. Claimant Carey “Tom” Shelp participated. Todd Crouse, President, represented the employer. Exhibit One was received into evidence. The parties waived formal notice on whether the claimant was discharged for misconduct or voluntarily quit for good cause attributable to 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: Carey “Tom” Shelp was employed by TCT Trucking as a full-time dispatcher from 2007 until April 12, 2010, when the employer ended the employment. Mr. Shelp had only performed dispatcher duties for employer. These duties included soliciting loads, soliciting new clients, and effectively communicating with clients and drivers. Todd Crouse, President, was Mr. Shelp’s immediate supervisor.

On Friday April 9, 2010, Mr. Crouse told Mr. Shelp that he could not afford to keep him on as dispatcher and that Mr. Crouse would be taking over the dispatching duties. Business had been slower since the fall of 2009 and Mr. Crouse was not convinced that Mr. Shelp was doing everything in his power to maintain and solicit business. Mr. Shelp had in fact performed his duties to the best of his ability and had followed directives Mr. Crouse had issue toward those ends. On April 9, 2010, Mr. Crouse told Mr. Shelp that he either needed to move into a driving position or separate from the employment. Mr. Shelp was not interested in returning to truck driving due to health issues relating to his back. Mr. Shelp had been a salaried employee receiving \$850.00 per week and had, for the most part, worked Monday-Friday, 7:30 a.m. to 5:00 p.m. The truck driving work would require significant time away from home, though Mr. Shelp would have most weekends home. The truck driving income would depend on available loads and how hard Mr. Shelp wanted to push himself.

On Monday, April 12, 2010, Mr. Shelp reported back to Mr. Crouse that he did not wish to move into a driving position. The employer then ended Mr. Shelp's employment. Mr. Shelp had not formed or indicated an intention to voluntarily separate from the employment.

**REASONING AND CONCLUSIONS OF LAW:**

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The evidence indicates that the employer, not Mr. Shelp, initiated the separation the employment. Thus, the separation could only be a layoff or a discharge. Given Mr. Crouse's belief that Mr. Shelp was not fulfilling his assigned duties, the weight of the evidence indicates that Mr. Crouse discharged Mr. Shelp from the employment.

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 a discharge 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 indicates that Mr. Shelp performed his assigned duties to the best of his ability in a flagging economy. The weight of the evidence does not establish either careless or negligent performance of the dispatch duties. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Shelp was discharged for no disqualifying reason. Accordingly, Mr. Shelp is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Shelp.

The administrative law judge notes that this matter could have been analyzed in the alternative as a voluntary quit in response to significant changes in the conditions of the employment. See Iowa Code section 96.5(1) and 871 IAC 24.26(1). The employer's decision to remove Mr. Shelp from his salaried dispatcher duties and place in him in a driving, commission-based position involved significant changes in the conditions of the employment that would have justified a voluntary quit that would have been for good cause attributable to the employer.

**DECISION:**

The Agency representative's May 7, 2010, reference 01, decision is modified as follows. 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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