

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TROY M THYS**  
Claimant

**APPEAL NO. 17A-UI-09030-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IDEAL READY-MIX CO INC**  
Employer

**OC: 12/25/16**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Troy Thys filed a timely appeal from the August 29, 2017, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Thys was discharged on August 4, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on September 25, 2017. Mr. Thys participated. Beverly Strah, Chief Financial Officer, represented the employer.

**ISSUE:**

Whether the claimant was suspended and/or 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: Troy Thys was employed by Ideal Ready-Mix Company, Inc. as a full-time cement truck driver from 2014 until August 7, 2017, when the employer suspended him from the employment. The employer subsequently sent Mr. Thys a letter on August 9, 2017, indicating that Mr. Thys was indefinitely suspended pending resolution of a pending charge of Operating While Under the Influence. Mr. Thys' employment required that Mr. Thys maintain a valid commercial driver's license. Mr. Thys' work hours were 7:00 a.m. to 6:00 p.m., Monday through Friday and occasional Saturdays. Mr. Thys' supervisors included Plant Manager Mark Heckenberg.

During the weekend of August 5-6, 2017, Mr. Thys was operating his personal motor vehicle off-duty when he was stopped by law enforcement officers for suspicion of operating under the influence of alcohol or drugs (OWI) in violation of Iowa Code section 321J.2. Mr. Thys had been consuming alcohol prior to the stop. Mr. Thys refused to take the preliminary breath test and field sobriety tests. Mr. Thys was transported to the Polk County Jail, where he refused to submit to the implied consent breath alcohol testing. Based on Mr. Thys' refusal to submit to chemical testing, the arresting officer, acting as an agent for the Iowa Department of Transportation, served notice on Mr. Thys that his driving privileges would be revoked for at least a year, effective 10 days following the arrest. In other words, the revocation would go into effect on or about August 16, 2017. When Mr. Thys reported for work on the morning of Monday, August 7, he told Mr. Heckenberg about the weekend arrest and pending OWI charge. At that time, Mr. Heckenberg sent Mr. Thys home while the employer reviewed the matter.

The employer next made contact with Mr. Thys through the letter dated August 9, 2017. In the letter, Mr. Heckenberg advised Mr. Thys that he was being placed on indefinite suspension due to failure to maintain a valid commercial driver's license and that his return to the employment would be conditioned upon resolution of the OWI charge and reinstatement of his commercial driver's license.

### **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). 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).

Iowa Administrative Code rule 871-24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

In *Cook v. Iowa Department of Job Service*, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that when a truck driver lost his insurability because of traffic tickets he accumulated, and thereby lost his ability to perform his driving duties, the loss was self-inflicted and constituted misconduct. In *Cook*, the claimant's employment required that he be able to operate motor vehicles. Through commission of traffic offenses and resulting convictions, the claimant rendered himself incapable of continuing in the employment. In the present case...

The evidence in the record establishes a discharge for no disqualifying reason. The evidence establishes that the employer "jumped the gun" by discharging Mr. Thys for revocation of his driving privileges nine days before the revocation was due to go into effect. Indeed, if Mr. Thys had appealed the D.O.T. license revocation, his driving privileges would have remained intact while his appeal of the D.O.T. action was pending. At the time of discharge, Mr. Thys' commercial driver's license and driving privileges remained valid. Mr. Thys is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The August 29, 2017, reference 03, decision is reversed. The claimant was discharged on August 7, 2017 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

jet/rvs