

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES L CARR
Claimant

APPEAL NO. 12A-UI-09921-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST JANITORIAL SERVICE INC
Employer

OC: 07/15/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

James Carr filed a timely appeal from the August 8, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 10, 2012. Mr. Carr participated and presented additional testimony through Dorene Draughn. Dave Neuhaus 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: James Carr was employed by Midwest Janitorial Service, Inc., as a part-time custodian from December 2011 until July 18, 2012, when Dave Neuhaus, branch manager, and Kim Hotchkiss, owner, discharged him from the employment. Mr. Neuhaus carried out the discharge. Mr. Carr's spouse, Dorene Draughn, also worked for the same employer. Mr. Carr had a series of three supervisors during the employment. Mr. Carr's supervisor for the last month of the employment was Area Supervisor Brenda Unger.

The employer discharged Mr. Carr from the employment after Ms. Unger alleged that Mr. Carr was not at his assigned site cleaning, but had clocked in and out to indicate he had been there. The employer does not know the date of the alleged incident. To clock in and out, Mr. Carr would have to call a designated telephone number when he arrived at a job site. At that number, Mr. Carr would leave the customer account number, his employee number, and would indicate whether he was clocking in or out. Mr. Carr's start time at the job site would vary. Mr. Carr's spouse also performed work at the time job site. Prior to discharging Mr. Carr from the employment, the employer transferred Mr. Carr to a different job site.

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 presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer did not have the start date of the employment, the end date of the employment, or the date of the alleged incident of time theft. The employer relied upon an allegation made by Mr. Unger, but failed to present any testimony, or even a written statement, from Ms. Unger. The employer failed to present any documentation of Mr. Carr's time reporting. The employer had the ability to present more direct and satisfactory evidence.

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

DECISION:

The Agency representative's August 8, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw