

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL R TRUDE**  
Claimant

**APPEAL NO. 130-UI-12882-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HOUSBY MACK INC**  
Employer

**OC: 06/23/13**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(8) – Current Act Requirement

**STATEMENT OF THE CASE:**

This matter was remanded to the Appeals Section for a new appeal hearing. The employer had filed a timely appeal from the July 11, 2013, reference 01, decision that allowed benefits. After due notice was issued, an in-person hearing was held on January 27, 2014. Claimant participated. Kevin Kilkenny represented the employer and presented additional testimony through Karen Holliday. Exhibits One through Five were received into evidence. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant.

The parties stipulated that the employer participated in the fact-finding interview that led to the July 11, 2013, reference 01, decision that allowed benefits.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Trude was employed by Housby Mack, Inc. as a full-time Lube Tech from 2011 until June 21, 2013, when Kevin Kilkenny, Lube Center Manager, and Kelly Housby, President, discharged him from the employment. Mr. Kilkenny was Mr. Trude's immediate supervisor throughout the employment. Mr. Trude's usual work hours were 3:00 p.m. to 11:00 p.m., Monday through Friday.

The final incident that triggered the discharge was Lube Tech Zach Van Sickle's purported June 21, 2013 discovery of for our five of Lube Tech Geddy Nible's work uniforms in a dumpster outside the Lube Center. Mr. Nible and Mr. Van Sickle both worked on the day shift. Neither worked on the evening shift with Mr. Trude. On the morning of June 21, 2013, Mr. Van Sickle

reported to Mr. Kilkenny that he had found Mr. Nible's work uniforms in the dumpster. Mr. Van Sickle asked whether there was any reason the uniforms should be in the dumpster. Mr. Kilkenny advised there was no reason. The pair then retrieved the uniforms from the dumpster. Mr. Kilkenny questioned Mr. Nible about the uniforms being in the dumpster and Mr. Nible indicated there was no reason for the uniforms to be in the dumpster. At 3:00 p.m. on June 21, when Lube Techs Chris Thompson and Bruce Jensen arrived to start their evening shift, Mr. Kilkenny asked them about Mr. Nible's work uniforms being in the dumpster. Mr. Thompson told Mr. Kilkenny that Mr. Trude had been cleaning in the changing area the evening before. Mr. Thompson had not seen Mr. Trude throw away the uniforms and had not seen the uniforms in the dumpster. Mr. Jensen had no knowledge of the matter. Mr. Kilkenny did not question Mr. Trude about Mr. Nible's uniforms being in the dumpster. Mr. Kilkenny concluded he did not have enough evidence to establish that Mr. Trude had placed Mr. Nible's uniforms in the trash dumpster. Mr. Kilkenny reported the matter to Mr. Housby, who decided that Mr. Trude should be discharged at that time anyway. Mr. Kilkenny did not mention the uniform incident when he notified Mr. Trude that he was discharged from the employment.

The next most recent incident that factored in the discharge occurred in May 2013, when Mr. Trude lost his temper when showing Lube Tech Nathan Driscoll how to properly lubricate a semi truck. During that incident, Mr. Driscoll told Mr. Trude, "I'm not going to be your bitch." Mr. Trude responded with profane statement that included the word fuck. Other staff was within earshot to hear Mr. Trude's loud outburst. Both Mr. Kilkenny and Human Resources representative Karen Holliday were present for the utterance, but neither said anything to Mr. Trude about it. Neither documented the incident. Mr. Kilkenny subsequently moved Mr. Driscoll to the day shift.

In making the decision to discharge Mr. Trude from the employment, the employer considered other matters. These included allegations from a couple Casey's mechanics that Mr. Trude was speaking ill of Housby Mack, and that he had inquired about work, when he dropped off trucks at the Casey's facility. Mr. Kilkenny also considered an incident wherein Mr. Kilkenny was present at the Lube Center County while Mr. Trude spoke to the owner of a client business about the status of Mr. Trude's commercial driver's license. The employer considered other allegations that Mr. Trude had spoken negatively about the employer.

Mr. Trude had received one reprimand during the course of the employment. That reprimand was issued in November 2011 and concerned failure to properly perform work duties in connection with a single vehicle.

#### **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 presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish by a preponderance of the evidence that Mr. Trude placed Mr. Nible's work uniforms in the trash dumpster. Mr. Kilkeny acknowledges that he did not have enough evidence at the time to prove that Mr. Trude had placed the uniforms in the trash. While the employer interviewed other staff about that matter, the employer did not present testimony at the hearing from any one of those employees. All but one of those employees is still with the employer.

Because the evidence fails to establish misconduct in connection with the uniform incident, the evidence in the record failed to establish misconduct. With regard to Mr. Trude's May 2013

outburst that was directed at Mr. Driscoll, the employer presented no testimony to refute Mr. Trude's assertion that he was responding in kind when he directed profanity at Mr. Driscoll. Though Mr. Kilkenny and Ms. Holliday were both present for that incident, neither documented it and neither spoke to Mr. Trude about it. That isolated incident of mutual use of profanity amongst coworkers demonstrated poor judgment, but would not rise to the level of misconduct that would disqualify Mr. Trude for benefits. In any event, that conduct, from May 2013, no longer constituted a current act at the time the employer discharged Mr. Trude from the employment at least three weeks later. The employer was vague on most dates and has presented insufficient evidence to establish any other misconduct conduct that would have been a current act at the time the employer ended the employment. The administrative law judge notes that the additional matters the employer took into consideration, including the allegations from the Casey's mechanics, do not rise above unsubstantiated allegations. None of the matters was discussed with Mr. Trude.

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

**DECISION:**

The Agency representative's July 11, 2013, reference 01, decision is affirmed. 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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