

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMADO GARZA
Claimant

APPEAL NO. 12A-UI-04000-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM JANITORIAL SERVICES NORTH
Employer

OC: 03/04/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 3, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 2, 2012. Claimant Amado Garza participated. Brad Sartin of Employers Edge represented the employer and presented testimony through John VanKamen, account manager. Spanish-English interpreter Ike Rocha assisted with the hearing. Exhibits One, Two, and Three were received into evidence.

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: The employer provides cleaning services at the John Deere foundry in Waterloo. Amado Garza was employed by ABM Janitorial Services North as a full-time general cleaner from 2008 until March 6, 2012, when the employer discharged him from the employment for alleged unauthorized early departures from work and alleged time card fraud. Mr. Garza is a Spanish-speaking person. Mr. Garza's working hours were 3:00 p.m. to 1:30 a.m., Wednesday through Saturday. Mr. Garza was the only ABM worker scheduled to work as late as 1:30 a.m. To clock in or out, Mr. Garza would have to insert a paper time card into a time clock. Mr. Garza's immediate supervisor for the last two or three months of the employment was Supervisor Cindy Bakken.

At some point on or before February 13, 2012, Ms. Bakken alleged to John VanKamen, ABM account manager, that Mr. Garza had left work early without authorization. Mr. VanKamen does not know what day Ms. Bakken brought the alleged conduct to his attention or how long Ms. Bakken had such concerns without mentioning them to Mr. VanKamen.

On February 13, Mr. VanKamen commenced his investigation into the matter. Mr. VanKamen was also investigating other employees suspected of time card fraud. Mr. VanKamen requested records from the John Deere security staff concerning Mr. Garza's use of his ID badge to enter and leave the John Deere facility through the doors and turnstile. Mr. VanKamen reviewed the security records and compared them to Mr. Garza's time card information. Mr. VanKamen does not know when he received the security records or when he finished reviewing them.

Based on his review of the John Deere security records, Mr. VanKamen reached the conclusion that Mr. Garza had left work early on three occasions: January 10, January 25 and February 8, 2012. For each of these dates, the John Deere written security records indicated that Mr. Garza had exited the facility prior to the scheduled end of his shift. Mr. VanKamen was only able to review video surveillance for February 8. The video surveillance showed Mr. Garza leaving the facility at 11:53 p.m. For each of the three days in question, Mr. Garza's time card indicated that he had completed his shift and had left at the scheduled time. The John Deere security records did not document Mr. Garza re-entering the facility on any of these three days or leaving the facility at the scheduled end of his shift on any of these three days. The employer does not rule out the possibility that the security staff might have buzzed Mr. Garza back into the facility without making him swipe his ID badge. The employer cannot explain how Mr. Garza could have left work early and still manage to clock out inside the facility at the appropriate time. Mr. Garza offers an explanation. On each of these instances, Mr. Garza had exited the facility for a cigarette break and re-entered the facility to complete his shift.

The employer did not interview Mr. Garza before concluding that he had left work early without permission and that he had falsified time card information. The employer suspended Mr. Garza on February 29 and had him return on March 6, at which time the employer discharged him from the employment.

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 evidence indicates that the most recent alleged act of misconduct dates from February 8, came to the employer's attention on or before February 13, but did not lead to any discussion with Mr. Garza until February 29. The employer cannot provide important dates to establish a reasonable basis for delay between the employer's first knowledge of the alleged misconduct and notice given to Mr. Garza on February 29 that he could or would be discharged from the employment as a result of the alleged misconduct. The administrative law judge notes that the employer had the ability and option of presenting testimony through Ms. Bakken, testimony through John Deere security personnel, or the documentation received from the John Deere security department. The administrative law judge concludes the record fails to establish a *current act*. In the absence of a current act, the administrative law judge concludes that Mr. Garza was discharged for no disqualifying reason. In the absence of a current act, the administrative law judge need not determine whether the alleged conduct involved misconduct.

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

DECISION:

The Agency representative's April 3, 2012, reference 01, decision is affirmed. The discharge was not based on a current act. 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