

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TY M ULCH
Claimant

APPEAL NO. 11A-UI-03917-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

INTERSTATE POWER & LIGHT COMPANY
Employer

**OC: 02/13/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 18, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 19, 2011. Claimant participated. Attorney Deborah Neyens represented the employer and presented testimony through Dawn March and Cindy Gunther. Exhibits One through Five were received into evidence.

ISSUE:

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: Ty Ulch was employed as a full-time meter reader from 1996 until February 11, 2011, when the employer discharged him for failure to report an accident. The incident that triggered the discharge occurred on January 27, 2011, when Mr. Ulch hit a heavy-duty weather gauge at a wastewater plant. Mr. Ulch was required to report the incident to his immediate supervisor. The employer provided Mr. Ulch with a telephone for use on his meter reading route. Mr. Ulch had left the work phone at his office, but has a personal cell phone in his possession. The wastewater plant was but five minutes drive from the office where Mr. Ulch was based. Mr. Ulch elected not to notify the supervisor of the accident. A city employee notified the employer of the incident on January 28, 2011. On February 1, a foreman questioned Mr. Ulch about the incident. Mr. Ulch initially denied knowledge of the incident and then said he had spaced off reporting it. While Mr. Ulch's immediate supervisor, Dawn March, had been away from work at the time of the accident, Ms. March had designated a person to whom Mr. Ulch should report in her absence and had specifically directed Mr. Ulch to report any safety issues to that person.

Ms. March learned of the January 27 incident when she returned to work on February 3, 2011. On February 9, 2011, Ms. March spoke with Mr. Ulch about the incident. The employer wanted

a union representative present, though the collective bargaining agreement allowed for waiver of the union representative and the employer had not asked Mr. Ulch whether he was willing to waive union representation. The union representative had to drive from Cedar Rapids to Manchester. Ms. March and a colleague had to drive from Dubuque to Manchester, approximately one hour. The employer reviewed Mr. Ulch's history of preventable accidents and failure to report safety issues. In September 2010, Mr. Ulch had collided with an above-ground cement sewer access because he had forgotten it was there after he parked his work truck in the vicinity. Mr. Ulch reported that matter. In December 2010, Mr. Ulch's truck got stuck and required a tow. Mr. Ulch failed to report that matter to the employer. After questioning Mr. Ulch on February 9, 2011, the employer discharged him from the employment. The meeting on February 9, 2011 was the first time the employer told Mr. Ulch that he faced possible or actual discharge from the employment based on the January 27, 2011 incident. Mr. Ulch had continued to perform his duties until the discharge on February 9, 2011.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 § 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 in the record establishes that Mr. Ulch was notified on February 9, 2011 that he would be discharged based on an incident that had occurred 13 days earlier on January 27. The matter had come to the employer's attention on January 28, when a city worker notified a foreman of the incident. The employer had first spoken to Mr. Ulch about the matter on January 1, when the foreman questioned him. The foreman said nothing to Mr. Ulch regarding the incident being a basis for possible discharge from the employment. The employer has failed to establish a reasonable basis for the 12-day delay between its knowledge of the incident and its notice to Mr. Ulch that the incident could lead to discharge from the employment. While a short delay to arrange schedules might have been reasonable, this case does not involve a short delay. The administrative law judge concludes that the discharge was not based on a current act and therefore the discharge would not disqualify Mr. Ulch for unemployment insurance benefits. Because the discharge was not based on a current act, the administrative law judge need not consider whether the conduct in question constituted misconduct and need not consider the prior incidents.

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

DECISION:

The Agency representative's March 18, 2011, reference 01, decision is reversed. 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/pjs