

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ADAM J GARDNER**  
Claimant

**APPEAL NO. 13A-UI-14145-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MIDWESTERN TRADING INC**  
Employer

**OC: 11/24/13  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 13, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on January 16, 2014. Claimant Adam Gardner participated. Rick Stickle represented the employer and presented additional testimony through Marsha Stickle and Tim Adams. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Thirteen were received into evidence.

The parties stipulated that the employer participated in the fact-finding interview.

**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: Adam Gardner was employed by Midwestern Trading, Inc., as a full-time forklift operator from February 2012 until November 26, 2013, when Marsha Stickle discharged him from the employment for alleged bad attitude and insubordination. Marsha Stickle is married to Rick Stickle, President and Owner, and handles human resources matters for the employer. Mr. Gardner's immediate supervisor during the last few months of the employment was Ryan Smith, Warehouse and Building Facilities Manager. Mr. Gardner's usual work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday.

The final incident that triggered the discharge occurred on November 26, 2013 and concerned Mr. Gardner's interaction with Marsha Stickle. That morning, Ryan Smith and Mr. Gardner were working on an assignment for a customer. Mr. Smith had assigned another employee to shovel corn into a large hopper. Later in the shift, Rick and Marsha Stickle arrived at the warehouse facility. Shortly after the Sticks arrived, Mr. Smith directed Mr. Gardner to assist the other employee with shoveling corn into the hopper. Mr. Gardner and the other employee completed the work as directed. As they were finishing, Marsha Stickle asked Mr. Gardner whether all the

corn had been shoveled. In lieu of providing a verbal response, Mr. Gardner gestured toward the now empty area of the floor where the pile of corn had once been. Marsha Stickle said she would take Mr. Gardner's gesture as a yes. After that brief encounter, Mr. Gardner placed the lids back on the hoppers. The time was 1:00 p.m. Mr. Gardner contacted Ryan Smith and the pair decided that Mr. Gardner should take his lunch break. Marsha Stickle then appeared at the office and asked Mr. Gardner what he was doing. Mr. Gardner said that he was taking his lunch. Marsha Stickle then yelled at Mr. Gardner that other employees were not taking their lunch break. Mr. Gardner then reported to Ryan Smith that he had just been yelled at for taking his lunch break. Mr. Smith then directed Mr. Gardner to vacuum a resin hopper. Ryan Smith told Mr. Gardner that the Stickles were yelling at everyone.

A short while later, Marsha Stickle again approached Mr. Gardner. Marsha Stickle was saying something to Mr. Gardner that he could not make out. Mr. Gardner asked Marsha Stickle, "What is your deal? Why are you muttering at me?" Marsha Stickle replied in an accusatory manner, "You just do what you want." At that point, Mr. Gardner went to the hopper and started vacuuming. Marsha Stickle then yelled, "We're going to get this settled right now." Marsha Stickle ripped the vacuum hose out of Mr. Gardner's hands and pulled the electrical cord out of the electrical outlet. Marsha Stickle then told Mr. Gardner to get out. Mr. Gardner said, "Are you kidding me?" As he was preparing to leave, Mr. Gardner told coworkers that he had been fired. Mr. Gardner then clocked out. As Mr. Gardner was exiting the facility, Marsha Stickle directed him to give her his key to the facility. Mr. Gardner said he would provide the key when he received his final paycheck. Mr. Gardner then left the facility. Mr. Gardner decided it was best to leave the key. Mr. Gardner left his key to the facility on Ryan Smith's truck and sent a text message to Mr. Smith advising that he had left the key.

The employer considered prior incidents in making the decision to discharge Mr. Gardner from the employment. The next most recent incident had occurred on November 12, 2013.

#### **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 administrative law judge notes, as did Mr. Gardner at the time of the hearing, that testimony from Ryan Smith was conspicuously absent from the hearing.

The weight of the evidence in the record fails to establish misconduct in connection with the final incident that triggered the discharge. The weight of the evidence indicates that on November 26, 2013, Mr. Gardner performed the work that was assigned to him. The administrative law judge notes that Mr. Gardner's work hours were 7:00 to 3:30 p.m. and that the discussion about whether Mr. Gardner was going to take his lunch break occurred around 1:00 p.m., six hours after he had started his shift and just two and a half hours before his shift was to end. It was not unreasonable for Mr. Gardner to expect to take his usual lunch break at that time or for Mr. Gardner to inquire whether Marsha Stickle intended to allow him to take a lunch break. The weight of the evidence establishes that on November 26 the employer provoked whatever bad attitude Mr. Gardner demonstrated by taking an unnecessary heavy-handed approach to issuing directives and otherwise demonstrating the employer's authority in the workplace. Having found no misconduct in connection with the final incident that triggered the discharge, there would be no current act of misconduct upon which to base a disqualification for benefits. Because there was no current act of misconduct, the administrative law judge need not further consider the prior incidents that might have factored in the discharge decision.

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

**DECISION:**

The Agency representative's December 13, 2013, reference 02, 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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