

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RANDY L TVRDY**  
Claimant

**APPEAL NO. 11A-EUCU-00688-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA WASTE SYSTEMS INC**  
Employer

**OC: 09/05/10**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Randy Tvrdy filed a timely appeal from the August 25, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on September 21, 2011. Mr. Tvrdy participated. David Crockett, Operations Manager, represented the employer. Exhibit One was received into evidence.

**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: Randy Tvrdy was employed by Iowa Waste Systems as a full-time bulldozer operator from March 2011 until August 5, 2011, when David Crockett, Operations Manager, discharged him based on an alleged safety violation. Mr. Tvrdy operated a bulldozer at a landfill. On the last day of the employment, it was raining, the landfill area was muddy, and trucks were getting stuck. Mr. Tvrdy pushed a number of trucks with his bulldozer to help them get unstuck. One truck company, Saar Trucking, did not want its trucks pushed. Instead, Saar Trucking wants its trucks pulled to free them when they were stuck. Mr. Tvrdy was aware of this expectation. Some Saar Trucking drivers nonetheless wanted to be pushed out and Mr. Tvrdy obliged. On the last day of the employment, one of the Saar drivers alleged to Mr. Crockett that he had been outside and in front of his truck at the time Mr. Tvrdy pushed it. The driver alleged to Mr. Crockett that he was in front of the truck waiting for Mr. Tvrdy to *pull* the truck. Mr. Tvrdy denies this. Mr. Tvrdy could see the driver seated in the cab at the time he pushed the truck forward five feet. The employer was concerned about the potential safety consequences if Mr. Tvrdy pushed a truck when the driver was standing in front of the truck.

Mr. Tvrdy had received a prior warning for pushing another truck that was supposed to be pulled.

## 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 weight of the evidence establishes that Mr. Tvrdy pushed the Saar trucks on the last day of the employment despite the fact that he had previously been told to only pull the Saar trucks. Mr. Tvrdy had previously been warned for pushing another truck that was supposed to be pulled. The fact that one or more Saar drivers wanted to be pushed did not alter the employer's policy of only *pulling* the Saar trucks. By disregarding that policy, Mr. Saar opened himself up to the allegation that he faced on the last day of the employment and exposed the employer to potential liability. Mr. Tvrdy's conduct in pushing the Saar trucks on the last day of the employment occurred in the context of a prior warning for pushing another truck that was supposed to be pulled. Given the short duration of the employment, the prior warning for similar conduct, and the multiple instances of disregarding the employer's policy on the last day of the employment, the evidence is sufficient to establish a pattern of behavior indicating a willful disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Tvrdy was discharged for misconduct. Accordingly, Mr. Tvrdy is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Tvrdy.

**DECISION:**

The Agency representative's August 25, 2011, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs