

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ROBERT A BAILIFF
200 W 2ND ST
GRAND RIVER IA 50108-7561

PER MAR SECURITY & RESEARCH CORP
PER MAR SECURITY SERVICES
C/O TALX EMPLOYER SVCS
PO BOX 1160
COLUMBUS OH 43216-1160

ROBERT A BAILIFF
1313 E 26TH ST
DES MOINES IA 50317

Appeal Number: 06A-UI-02909-JTT
OC: 02/05/06 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Per Mar Security Services filed a timely appeal from the February 27, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 31, 2006. Claimant Robert Bailiff participated. Operations Manager Todd Burri represented the employer and presented additional testimony through Site Supervisor Matthew Cunningham. The administrative law judge took official notice of Agency administrative records regarding benefits disbursed to the claimant. Exhibits One and Two were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Bailiff was employed by Per Mar Security Services as a full-time security officer from November 23, 2005 until February 10, 2006, when Site Supervisor Matt Cunningham

discharged him. Per Mar Security Services took over the security contract for Osceola Foods and Power Logistics on November 23, 2005. Another security company had held the contract previously, and Mr. Bailiff had performed services at Osceola Food and Power Logistics site under the prior security company. Mr. Cunningham had been Mr. Bailiff's immediate supervisor for eight months prior to the date of discharge.

The final incident that prompted the discharge occurred on February 3, 2006. Mr. Bailiff was instructed to salt sidewalks. This is a service that the security service had provided to Osceola Foods and Power Logistics for nine years. On the day in question, Mr. Bailiff had been on the sidewalk in question four or five times. Mr. Bailiff had noted that the sidewalk was wet, but not icy. Mr. Bailiff had also observed that the sidewalk already had a great deal of salt on it. Mr. Bailiff indicated to a supervisor that he would not place additional salt on the sidewalk and provided his reasons. Mr. Bailiff had previously complained to Per Mar management about having to salt sidewalks at Osceola Foods and Power Logistics. Mr. Bailiff did not believe this was a service that Per Mar should be providing to Osceola Foods and Power Logistics. Mr. Bailiff had had this conversation with multiple supervisors and had gone up the chain of command to make his point. Mr. Bailiff had not refused to salt the sidewalk prior to February 3, 2006.

Though the final incident that prompted the discharge occurred on February 3, Site Supervisor Matt Cunningham did not meet with Mr. Bailiff to discharge him until February 10, 2006. In the interim, Mr. Cunningham had been off work one day, Mr. Bailiff had been off work two days, and Mr. Cunningham had consulted with a superior. In making the decision to discharge Mr. Bailiff from the employment, Mr. Cunningham also considered Mr. Bailiff's failure to comply with the employer's grooming policy, which required him to appear clean-shaven for work.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Bailiff was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, a discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record fails to establish misconduct that would disqualify Mr. Bailiff for unemployment insurance benefits. The evidence indicates that on February 3, 2006,

Mr. Bailiff's refusal to add salt to an already salted sidewalk was reasonable and, therefore, not insubordination. While the decision to discharge Mr. Bailiff from the employment was within the employer's discretion, the evidence fails to establish a current act of misconduct that might serve as a basis for disqualifying Mr. Bailiff for unemployment insurance benefits.

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

DECISION:

The Agency representative's decision dated February 27, 2006, reference 01, 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.

jt/kjw