

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW R LAWRENCE
Claimant

APPEAL NO. 16A-UI-11490-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMES RENTAL PROPERTIES COOP
Employer

OC: 10/02/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Andrew Lawrence filed a timely appeal from the October 18, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Lawrence was discharged on August 29, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on November 8, 2016. Mr. Lawrence participated. Steve Ames represented the employer and presented additional testimony through Lance Rodberg and Carol Deahl.

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: Andrew Lawrence was employed by Ames Rental Properties as a full-time property maintenance worker from November 2015 until August 29, 2016, when the business owner, Steve Ames, discharged him from the employment. Mr. Lawrence was assigned to perform maintenance and repair work at Douglas Terrace Apartments in Des Moines. That property consists of 72 rental units in three buildings plus an office structure. From early March 2016 through the end of Mr. Lawrence's employment, Lance Rodberg was Onsite Manager at Douglas Terrace Apartments and was Mr. Lawrence's immediate supervisor. Mr. Rodberg's predecessor had hired Mr. Lawrence. Prior to July 2016, Mr. Lawrence did not have set work hours. Instead, the employer and Mr. Lawrence had an understanding and agreement that Mr. Lawrence would perform 40 hours of property maintenance work per week and that Mr. Lawrence to be available to address after-hours emergency maintenance issues. Mr. Ames designated the start of Mr. Lawrence's work week at 5:01 p.m. on Friday and the end of the work week as 5:00 p.m. on the following Friday. Mr. Rodberg's predecessor did not require Mr. Lawrence to complete a time card on a regular basis. Instead, the employer just automatically paid Mr. Lawrence for 40 hours of weekly maintenance work under the belief that Mr. Lawrence was in fact performing 40 hours of work per week pursuant to the agreement. Mr. Lawrence's compensation also included discounted rent on an apartment at Douglas Terrace Apartments.

In February 2016, Mr. Lawrence suffered a workplace injury that he describes as nerve damage to his left arm in connection with using a chiseling device akin to a small jackhammer to create plumbing repair access in a concrete floor. Mr. Lawrence is left-handed. The repetitive-use injury affected Mr. Lawrence's ability to move his left arm and wrist and affected his ability to grip with his left hand. The employer completed a first report of injury and reported the matter to its worker's compensation carrier. The worker's compensation physician referred Mr. Lawrence for physical therapy. Mr. Lawrence progressed in his recovery to the point where he could install a door unassisted, but continued to participate in physical therapy through the end of the employment. The physical therapy appointments generally lasted an hour.

In May 2016, a rental inspector identified six pages worth of rental housing deficiencies involving 20 to 30 units at Douglas Terrace Apartments. The inspector provided a three-month deadline for resolving the deficiencies. The three-month deadline was August 11, 2016. Performing or facilitating the necessary repairs fell within the scope of Mr. Lawrence's duties. Roughly one-third of the deficiencies had been addressed by the August 11 deadline. The employer requested and received an extension of the deadline. Mr. Rodberg concluded that Mr. Lawrence was not making satisfactory progress toward resolving the deficiencies. This failure to make satisfactory progress on the task was one factor in the employer's decision to discharge Mr. Lawrence from the employment.

At the beginning of July 2016, Mr. Rodberg told Mr. Lawrence that he expected him to work Monday through Friday, start his work day at 9:00 a.m., check in with Mr. Rodberg at the office at the start of his work day, and work until about 6:00 p.m. During the last week or two of the employment, Mr. Rodberg told Mr. Lawrence to start clocking in at 9:00 a.m. That directive followed a disagreement about whether Mr. Lawrence had been on-site working on a particular occasion. The employer purchased a timeclock and placed it in the rental office.

The final incident that triggered the discharge occurred on Friday, August 26, 2016, when Mr. Lawrence submitted a weekly time report that included a request to be paid for eight hours of work on Tuesday, August 23, 2016. On August 23, Mr. Lawrence had gone to a physical therapy session scheduled for 9:30 a.m. Mr. Lawrence was supposed to clock in at 9:00 a.m., go to the appointment, and report to work after the appointment. Mr. Lawrence did not clock in at 9:00 a.m. At that time, Mr. Lawrence was in his apartment and in the process of communicating with the worker's compensation carrier by telephone. The call with the worker's compensation carrier had begun prior to 9:00 a.m. Mr. Rodberg sent Mr. Lawrence a series of text messages asking whether Mr. Lawrence was coming to the office to sign in. Mr. Lawrence advised by text message that he was on the phone with the worker's compensation representative, was taking care of some paperwork, and would be down to sign in. Mr. Rodberg needed to leave the premises and included this information in his text messages to Mr. Lawrence. Mr. Lawrence finished his contact with the worker's compensation carrier at about 9:10 a.m. and then went to the office to clock in. At that time the office door was locked. Mr. Lawrence left for his physical therapy appointment. Mr. Lawrence and Mr. Rodberg passed each other in the parking lot as Mr. Lawrence was leaving. Mr. Lawrence finished with the physical therapy appointment at 10:30 a.m. Mr. Lawrence then returned to the apartment complex and started working to repair the ceiling in one of the units. Mr. Lawrence spoke to Mr. Rodberg before he went to lunch. After lunch, Mr. Lawrence worked on a toilet repair. During that afternoon, Mr. Rodberg notified Mr. Lawrence that he would be counted as absent that day because he had not signed in.

Mr. Lawrence was supposed to work on August 24, but did not work that day. Prior to 9:00 a.m., Mr. Lawrence sent a text message to Mr. Rodberg indicating that he was "under the weather." Mr. Lawrence did not report any work hours or request payment for August 24.

Mr. Rodberg asserts there were additional instances of tardiness, but is unable to provide dates or details concerning those alleged additional absences.

Another factor in the decision to discharge Mr. Lawrence from the employment was the employer's belief that Mr. Lawrence was unnecessarily leaving air conditioners on in vacant rental units, which resulted in the employer receiving a utility bill for vacant units. On July 14, Mr. Rodberg had issued a reprimand to Mr. Lawrence that addressed leaving the air conditioner on in two units. One of those units was a unit 25 on the ground floor where tools were stored. Mr. Lawrence had left the air conditioner on in unit 21 because he had been performing work in that unit. Mr. Rodberg asserts there were several other vacant units involved. Mr. Rodberg cannot recall the dates or details of any similar conduct following the July 14 reprimand.

On May 17, Mr. Rodberg has issued a reprimand to Mr. Lawrence for purported tardiness, purported failure to answer his phone, and nonpayment of rent.

Another matter that factored in the discharge decision concerned Mr. Lawrence's attempt on July 11, 2016 to persuade Carol Deahl, who handled payroll, to authorize payment of \$800.00 to Mr. Lawrence's girlfriend, Reyna Jacobo. The employer had authorized payment to Ms. Jacobo of \$150.00 painting work that she had performed at the complex. Mr. Lawrence notified Ms. Deahl that Mr. Ames had approved the extra \$800.00 payment to Ms. Jacobo, but Mr. Ames had not approved the extra payment. Ms. Deahl immediately contacted Mr. Ames about the matter. Mr. Ames confirmed he had not authorized payment. The employer did not issue the payment.

A similar matter took place at the end of July 2016, when Mr. Lawrence submitted a duplicate request for payment to Ms. Jacobo of \$150.00 for painting when the employer had already issued payment for the work. The employer did not issue the additional payment.

On August 29, Mr. Ames had Mr. Rodberg notify Mr. Lawrence that he was discharged from the employment. Mr. Ames then followed up with a letter setting forth the reasons for the discharge. These included an allegation that Mr. Lawrence had asserted on his August 26 time card that he had been in therapy from 10:30 to 5:00 p.m. on August 23, along with an allegation that Mr. Lawrence had failed to make contact with Mr. Rodberg or perform any work on that day, but had submitted a request for eight hours pay. The discharge letter also referenced the utility bill issue. The discharge letter also referenced the July requests for additional payments to Ms. Jacobo.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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).

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 several issues in the employment, including a lack of meaningful structure and oversight throughout the employment that led to predictable problems in the employment. Much of the employer's evidence comes down to the testimony of Mr. Rodberg and the reliability of that testimony. However, Mr. Rodberg's testimony was substantially lacking in detail. Mr. Rodberg's memory was lacking and he apparently had not documented events as they were occurring.

The employer presented insufficient evidence to rebut Mr. Lawrence's testimony that he did in fact perform work for the employer on August 23, 2016 upon his return from his physical therapy

appointment. The employer presented insufficient evidence to establish that Mr. Lawrence had written on his timecard that he was at physical therapy from 10:30 a.m. to 5:00 p.m. on October 23. The evidence does establish that Mr. Lawrence was late making contact with Mr. Rodberg on the morning of August 23, even though Mr. Rodberg testified that Mr. Lawrence just had to make contact prior to 10:00 a.m. The employer presented insufficient evidence to establish any prior unexcused absences.

The employer's mere assertion that Mr. Lawrence had only completed one-third of the repairs that needed to be performed in response to the inspection report is sufficient to establish that Mr. Lawrence was not performing to the employer's satisfaction, but is not sufficient to establish misconduct. This, again, is an area where Mr. Rodberg's testimony was lacking in specifics. The evidence established that Mr. Lawrence had performed substantial work toward the six-page list of deficiencies. The evidence also establishes that Mr. Lawrence's extended recovery from a work-related injury was likely a substantial factor in the amount of work he was able to perform. The sheer number of rental property deficiencies and the number of units involve strongly suggest a problem much larger than the concern regarding Mr. Lawrence's work performance.

The employer presented insufficient evidence to establish that Mr. Lawrence negligently or carelessly left air conditions running in vacant units subsequent to the July 14 reprimand. The evidence established that the employer had 20 to 30 units that needed work and that air conditioning units needed to be on while Mr. Lawrence performed such work. This again is an area where Mr. Rodberg's testimony was lacking in dates and details concerning matters subsequent to the July 14 reprimand.

The evidence did establish misconduct in connection Mr. Lawrence's attempts to pad Ms. Jacobo's check in July, but those matters were addressed in July, long before the employment ended.

The administrative law judge cannot find disqualifying misconduct based on the evidence in the record and concludes that Mr. Lawrence was discharged for no disqualifying reason. Accordingly, Mr. Lawrence is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 18, 2016, reference 01, decision is reversed. 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