

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM E ROBY
Claimant

APPEAL NO. 11A-UI-13885-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GAZETTE COMMUNICATIONS INC
Employer

**OC: 09/18/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

William Roby filed a timely appeal from the October 18, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 15, 2011. Mr. Roby participated. Janie Ricklefs, Human Resources Manager, represented the employer. Exhibits One, Four, Five and Six were received into evidence. The administrative law judge took official notice of the Linn County Clerk of Court records regarding case number FECR093789, which records are available to the general public at www.iowacourts.state.ia.us.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Roby was employed by Gazette Communications as a full-time press operator from 1999 and last performed work for the employer on May 14, 2011. Mr. Roby's work hours were 6:00 p.m. to 4:00 a.m. Wednesday evening through Sunday morning.

On Monday May 16, 2011, Mr. Roby was arrested at his home and charged with First Degree Kidnapping. The conduct upon which the criminal charge was based was alleged to have involved a sexual assault at Mr. Roby's residence on the evening of Sunday, May 15, 2011.

The arrest and criminal charge came to the employer's attention on May 17, 2011, when KCRG-TV9 published an article about the matter. KCRG is a division of Gazette Communications.

On May 17, Vice President Jim Burke sent a letter to Mr. Roby advising that Mr. Roby was placed on unpaid suspension pending the employer's final decision about his employment. The letter advised Mr. Roby that he was not allowed on The Gazette Company property until further notice. The letter indicated that the employer would advise Mr. Roby of the employer's final decision.

On May 20, Mr. Burke sent a letter to Mr. Roby advising that: "Due to the serious nature of the allegations that have been made against you, we have decided to terminate your employment." The letter reiterated that Mr. Roby was not allowed on company property.

None of the conduct that prompted the arrest or charges occurred on the employer's property, occurred during work hours, involved any other Gazette employee, or had any connection with the employment. Instead, the employer was concerned about the threat Mr. Roby might pose in the workplace. The employer was also concerned about negative publicity.

The employer did not conduct any independent investigation into the alleged criminal conduct prior to suspending or discharging Mr. Roby from the employment. The employer's knowledge of the alleged criminal conduct was limited to articles published by KCRG-TV9.

After his May 16 arrest, Mr. Roby continued to be incarcerated until he posted \$100,000.00 surety bond on May 23, 2011. Mr. Roby was in custody when he received the employer's May 17 suspension letter and May 20 discharge letter. At the time the employer suspended Mr. Roby and barred him from company property, Mr. Roby had not missed any work shifts.

The employer had a written conduct policy that had been provided to Mr. Roby during the employment. The policy begins as follows:

Your performance and professionalism are an important part of our Company's reputation. Our policies regarding conduct are designed to benefit both employees and the Company. We expect you to use common sense and reasonable judgment at all times. Misconduct or inappropriate behavior are serious matters and can jeopardize employment.

Behavior problems affecting performance will be dealt with on an individual basis. An employee's previous work history may be taken into account in determining the appropriate action to be taken. Other considerations might include seriousness of the offense, harm and damage caused, and any criminal considerations.

The following are examples of some but not all situations that may result in counseling and/or disciplinary action up to and including termination:

The policy then lists various conduct "on Company time, on Company premises or in Company vehicles" that may result in workplace discipline. The policy specifically references conduct off Company time, premises, or outside of company vehicles are the following:

Sexual or other forms of harassment in the workplace, at work-related activities, and when socializing with coworkers, clients and customers outside the workplace.

...

Publishing information on a personal blog or internet chat room that contributes to a hostile work environment, discloses confidential Company information, or damages the Company's reputation.

The policy closes with the following sentence: "This list is not intended to be all-inclusive, but is meant to serve as a guide."

Mr. Roby established a claim for unemployment insurance benefits that was effective September 18, 2011.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c).

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

A claimant is deemed to have left if the claimant becomes incarcerated and the separation presumed to be a voluntary quit without good cause attributable to the employer. See 871 IAC 24.25(16).

The weight of the evidence establishes that the separation from the employment occurred as a result of the employer suspending Mr. Roby on May 17 and discharging Mr. Roby on May 20, 2011. At the time the employer suspended Mr. Roby from the employment, he was incarcerated but had not yet missed any work. At the same time the employer suspended Mr. Roby, the employer barred him from the workplace and put him on notice that the employer was contemplating ending his employment. A reasonable interpretation of Iowa Administrative Code section 871 IAC 24.25(16) would require some period of missed work due to incarceration before a claimant could be deemed to have "voluntarily" separated from the employment as a result of the incarceration. The evidence in the record in no manner indicates a *voluntary* separation from the employment. The employer's assertion that Mr. Roby was absent from shifts subsequent to the suspension is without merit. Having been suspended and barred from the workplace, there would be no way for Mr. Roby to appear for such shifts under such circumstances, regardless of whether he was incarcerated.

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 a suspension or discharge 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).

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The worker was *convicted* of selling cocaine off the employer's premises. The Court found misconduct. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

The evidence leads the administrative law judge to conclude that the employer's policy concerning misconduct did extend to Mr. Roby's off-duty conduct. The opening paragraph of the employer's policy accomplishes this:

Your performance and professionalism are an important part of *our Company's reputation*. Our policies regarding conduct are designed to benefit both employees and the Company. We expect you to use common sense and reasonable judgment *at all times*. Misconduct or inappropriate behavior are serious matters and can jeopardize employment.

[Emphasis added.] Though the employer's examples of conduct that could lead to discipline focused primarily on workplace misconduct, the list did include off-duty examples, and the final sentence of the policy indicated that the list of examples was not intended to be exhaustive. A reasonable employee reviewing the policy in the context of the particular employment would understand that his off-duty conduct could be considered by the employer in deciding whether to continue the employment.

But the present case is distinguishable from Kleidosty in an important regard. Whereas Ms. Kleidosty had been *convicted* of the criminal offense at the time her employer discharged her from the employment, Mr. Roby was not *convicted* of the criminal charge that prompted the employer to suspend him and discharge him from the employment. Instead, at the time of the suspension and discharge from the employment, Mr. Roby had merely been charged with alleged criminal offense. Neither the employer nor anyone else had done anything to *prove* at that point that Mr. Roby had indeed committed the alleged offense.

Despite the shocking nature of the allegation against Mr. Roby, the evidence in the record establishes that Mr. Roby was discharged for no disqualifying reason. Mr. Roby is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Roby.

DECISION:

The Agency representative's October 18, 2011, 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