

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TIMOTHY D SMITH
Claimant

APPEAL NO. 18A-UI-04476-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
Employer

OC: 03/04/18
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code Rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Timothy Smith filed a timely appeal from the April 5, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Smith was discharged on December 27, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on May 7, 2018. Mr. Smith participated personally and was represented by attorney John Doak. Brian Duffy represented the employer and presented additional testimony through Georgette Coykendall. Exhibits 1 and 4 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Timothy Smith was employed by Per Mar Security & Research Corporation as the full-time Director of Corporate Support until December 27, 2017, when Brian Duffy, President of the Electronic Security Division within Per Mar Security & Research Corporation, discharged him from the employment. Mr. Duffy was Mr. Smith's supervisor. Mr. Smith began his employment with Per Mar in 1997.

The employer references no particular incident or event as the trigger for the discharge decision, but instead references a decrease in Mr. Smith's value to the company as the basis of the discharge decision. On November 16, 2017, Mr. Duffy issued a Disciplinary/Counseling Report to Mr. Smith. The written reprimand was based in part on Mr. Duffy's conclusion that Mr. Smith had failed to exercise appropriate oversight in connection with the company's purchase of vehicles to service a new account. The oversight concern came to Mr. Duffy's attention on November 13, 2017. On November 14 and 15, 2017, Mr. Duffy investigated the

matter further and questioned Mr. Smith about the matter. In addition to faulting Mr. Smith for exercising appropriate oversight of the vehicle purchase, written reprimand faulted Mr. Smith for being too focused on Mr. Duffy's concerns and not being an independent thinker or strong enough leader. When Mr. Duffy issued the written reprimand on November 16, 2017, he told Mr. Smith that the concerns raised in reprimand would not warrant discharge from the employment. Mr. Smith signed the reprimand to acknowledge receipt of the reprimand and to acknowledge that the matter had been discussed with him. Boilerplate language immediately above the employee acknowledgment section stated as follows:

Immediate and ongoing improvement regarding the incident(s) stated above is expected. In addition, it is an expectation that there will be no additional incidents regarding any other performance or behavior standards. However, in the future, [if] any further incidents including, but not limited to, the incident(s) noted above occur it may result in further action up to and including termination of employment.

Aside from Mr. Duffy's belief that Mr. Smith's value to the company had diminished, there were no further concerns regarding Mr. Smith's employment during the period between November 16, 2017 and the December 27, 2017 discharge date.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The evidence in the record establishes a December 27, 2017 discharge that was not based on a current act. The car purchase concern that prompted inquiry in November 2017 came to the employer's attention on November 13, 2017, was further investigated by Mr. Duffy on November 14 and 15, 2017, and resulted in the written reprimand issued on November 16, 2017. At that time, Mr. Duffy advised Mr. Smith that the concerns addressed in the reprimand would not warrant discharge from the employment. The employer's decision to discharge Mr. Smith 41 days later was not based on any current act. Accordingly, there is no basis for a finding of disqualifying misconduct. Mr. Smith is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The April 5, 2018, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was not based on a current act. 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/rvs