

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**OSCAR A DIAZ**  
Claimant

**FORT DODGE COMMUNITY SCHOOL DIST**  
Employer

**APPEAL 21A-UI-03033-AW-T  
ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/27/20  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Claimant filed an appeal from the January 7, 2021 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 24, 2021, at 10:00 a.m. Claimant participated. Spanish interpretation was provided by Jessica (ID# 11643) from CTS Language Link. Employer participated through Ryan Utley, Director of Buildings and Grounds, and Jordan West, Head Custodian. Employer's Exhibits 1 – 7 were admitted.

**ISSUE:**

Whether claimant's separation was a discharge for disqualifying job-related misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time Custodian from September 6, 2018 until his employment with Fort Dodge Community School District ended on September 28, 2020. Claimant's direct supervisor was Jared West, Head Custodian.

On September 14, 2020, claimant reported to West that he was not feeling well and had a fever. West instructed claimant to go home per employer's Covid-19 policy. Claimant refused to leave work. West told claimant to wear a face mask. Claimant refused. Claimant then coughed in West's direction without attempting to cover his mouth and then smirked at West. There were other custodians present. West reported the incident to his supervisor. Employer investigated the complaint by interviewing five custodians who witnessed the incident. The witnesses confirmed West's version of events on September 14, 2020.

On September 15, 2020, claimant notified West that he was diagnosed with Covid-19. Claimant quarantined for ten days. Claimant returned to work on September 25, 2020. Employer interviewed claimant regarding West's complaint on September 25, 2020. On September 28, 2020, employer discharged claimant for serious misconduct on September 14, 2020.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge cannot be based on such past act or acts. The termination of employment must be based on a current act.

Conduct asserted to be disqualifying misconduct must be current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). Whether the act is current is measured by the time elapsing between the employer's awareness of the misconduct and the employer's notice to the employee that the conduct provides grounds for dismissal. *Id.* at 662.

Employer became aware of the incident on September 14, 2020. Employer interviewed claimant about the incident on September 25, 2020, which put claimant on notice that his conduct may be grounds for dismissal. Eleven days elapsed between the incident and employer providing notice to claimant. However, claimant was absent from work due to quarantine for ten of those days. Employer interviewed claimant the day that he returned to work from quarantining and discharged claimant three days after his interview. Therefore, the act is considered current.

Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.* 367 N.W.2d 300 (Iowa Ct. App. 1985). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *Woods v. Iowa Dep't of Job Serv.*, 327 N.W.2d 768, 771 (Iowa 1982).

Employer requested claimant leave work after reporting a fever. Employer's request was reasonable in light of Covid-19 and risk of transmission. Employer's request was made pursuant to its Covid-19 policy. Claimant refused to leave work. Claimant's refusal was not reasonable. Employer requested claimant wear a face mask. Employer's request was reasonable. Claimant not only refused to wear the mask but also coughed in his supervisor's direction without attempting to cover his mouth. Claimant's actions on September 14, 2020 were not in good faith or for good cause. Claimant's actions constitute disqualifying job-related misconduct even without a prior warning. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

**DECISION:**

The January 7, 2021 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.



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Adrienne C. Williamson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
Iowa Workforce Development  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515)478-3528

March 30, 2021  
Decision Dated and Mailed

acw/scn