

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DAVID D MILLARD
Claimant

CONLIN PROPERTIES
Employer

APPEAL NO. 21A-UI-21693-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/29/21
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, David Millard, filed a timely appeal from the September 24, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on August 31, 2021 for insubordination in connection with the employment. After due notice was issued, a hearing was held on November 19, 2021. Claimant participated and presented additional testimony through Craig Rodgers. Kathy DeWald represented the employer. Exhibits 1 through 12, 14, A and B were received into evidence.

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: The claimant, David Millard, was employed by Conlin Properties, Inc. during two distinct periods. The most recent period of employment began in November 2019 and ended on August 31, 2021, when the employer discharged the claimant from the employment. During the period recent period of employment, the claimant worked as a full-time maintenance technician at the Canterbury Park Apartments. Tamy Newberry, Property Manager, was the claimant's immediate supervisor. Jerrod Gaskill, Maintenance Coordinator, oversees about two dozen maintenance technicians at several apartment complexes and functioned as a secondary supervisor.

In January 2021, the claimant suffered a workplace injury to his left shoulder. The injury gave rise to a workers' compensation claim. The claimant was not correctly diagnosed until March 2021, after he requested a second medical opinion. The claimant's primary injury was diagnosed as a 70 percent tear in the claimant's left rotator cuff. The claimant underwent surgery on his shoulder on June 2, 2021 and was released to return to modified work effective June 4, 2021. At the time the claimant returned, he was restricted from any use of his left arm, was required to wear an immobilizing brace, and was taking prescribed narcotics for pain.

On June 25, 2021, the employer issued a written reprimand to the claimant after the claimant refused to perform work tasks that he believed he could not perform or could not safely perform in light of his health condition. The claimant became upset and argumentative in connection with the incident. The employer issued the written reprimand in connection with the incident.

The employer had an employee handbook that included a code of conduct. The code of conduct addresses the need to be respectful of others. The claimant was aware of the policy. The claimant received an employee handbook in 2017 in connection with the earlier period of employment, but no in connection with the most recent period of employment.

On August 31, 2021, the employer discharged the claimant in response to an August 18, 2021 incident. On August 18, 2021, Ms. Newberry or Assistant Manager Jade Buccam-Ecklor directed the claimant to change a smoke detector battery and a light bulb. By that time, the claimant's updated written medical restrictions restricted him from lifting greater than five pounds with his left hand, but did not reference other restrictions. At the time, the claimant was regularly participating in physical therapy sessions as part of his recovery and reasonably understood that he was not to perform any work that required him to raise his left arm above his shoulder. The claimant changed the smoke detector battery. The claimant discovered the smoke detector needed to be replaced, a task that would require use of both arms above shoulder height. The claimant also discovered that the bulb that needed changed was within a ceiling fixture and that removing the fixture would require use of both arms above shoulder height. The employer alleges the claimant yelled at the person who issued the directive when refusing to perform the overhead work. The claimant denies that he yelled. The claimant and the person issuing the directive were the only witnesses to the interaction. Kathy DeWald, Human Resources Director, became involved in the matter effective June 18, 2021 and conducted an incomplete, one-sided investigation of the matter whereby she solicited statements from staff other than the claimant, but did not interview or solicit a statement from the claimant. The employer waited until the August 31, 2021 discharge meeting to address the August 18, 2021 incident with the claimant. The claimant continued to perform his regular duties between August 18 and August 31.

The claimant was still recovering from his workplace injury and was still receiving medical care pursuant to the workers' compensation claim at the time the employer discharged the claimant from the employment.

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).

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment

insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418 (Iowa Ct. App. 1989).

The evidence in the record establishes a discharge for no disqualifying reason. The evidence in the record fails to establish a current act of misconduct. The employer's sole witness at the appeal hearing was not present for the final interaction on August 18, 2021 that triggered the August 31, 2021 discharge. The employer had the ability to present testimony from the person who was present for that interaction, but elected not present such testimony. While the employer asserts the discharge was based on the claimant yelling during the incident, the employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut the claimant's testimony that he did not yell in connection with the incident. The employer conducted a one-sided, incomplete investigation of the matter in question. While the employer asserts the discharge was not based on the claimant's refusal to perform the tasks at issue on August 18, 2021, the discharge document contradicts that assertion. See Exhibit 14. The claimant reasonably concluded he was not medically able to perform work that required him to raise his left arm above his shoulder. The claimant presented corroborating testimony from a physical therapy assistant who assisted with his physical therapy during the relevant period. The claimant's refusal to replace the smoke detector and refusal to replace the bulb were reasonable under the circumstances. The directive that the claimant perform such work was unreasonable under the circumstances. The next most recent incident that factored in the discharge occurred on June 24, 2021 and was not a "current act" at the time of the discharge. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider the earlier incident.

The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 24, 2021, reference 01, decision is reversed. The claimant was discharged on August 31, 2021 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



James E. Timberland
Administrative Law Judge

December 28, 2021
Decision Dated and Mailed