

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID J MATHIAS
Claimant

APPEAL NO. 08A-UI-09760-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**"PARCO LTD
"WENDY'S OLD FASHIONED
HAMBURGERS**
Employer

**OC: 09/21/08 R: 04
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

David Mathias filed an appeal from a representative's decision dated October 16, 2008, reference 01, which denied benefits based upon his separation from Parco, LTD. After due notice was issued, a hearing was held by telephone on November 6, 2008. Mr. Mathias participated personally. Participating as a witness was Ms. Zelda Inman, claimant's grandmother. The employer participated by Mark McGowen, District Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for a current act of misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant most recently worked for this employer from January 28, 2008 until September 22, 2008. Mr. Mathias was employed as a part-time crew person who was paid by the hour. His most recent immediate supervisor was Mr. Mark McGowen, District Manager.

Mr. Mathias was discharged from his employment with Wendy's on September 30, 2008 for an incident that had occurred on September 20, 2008. On that date, the claimant did not report as scheduled at 7:00 a.m. but was allowed to report at 11:00 a.m. and begin performing duties for the company. Shortly after arriving, Mr. Mathias became aware of a personal issue at home and briefly left during the shift stating: "I'm done." The claimant returned a few minutes later and was allowed to resume his work by the assistant manager that was on duty, Julie Rett. Mr. Mathias was warned at that time that if it happened again, "He would be terminated." The claimant was allowed to continue to report for scheduled shifts. On September 22, Mr. Mathias was incarcerated because of an ongoing investigation regarding cash shortages at his place of employment. Charges against the claimant were subsequently dropped. The claimant was not discharged for missing work due to his incarceration.

The claimant was discharged when the company's district manager reviewed the incident that had taken place some ten days earlier on September 20, 2008. Because the claimant had a previous incident or incidents of failing to report or provide notification during prior employment and because the district manager believed that the claimant had left work on September 20 during the shift without authorization, a decision was made to terminate Mr. Mathias. It appears that because in part, the claimant was incarcerated the employer believed that there was no urgency in making a decision as to whether to discharge the claimant. At the time of hearing the employer confirmed that the charges against Mr. Mathias had been dropped.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Mathias was discharged for a current act of misconduct in connection with the employment. It does not.

In this highly unusual case the evidence establishes that Mr. Mathias was discharged based upon an incident that had occurred approximately ten days earlier on September 20, 2008. On that date, for reasons that are unclear, Mr. Mathias had not reported for work at the scheduled time but subsequently reported at 11:00 a.m. and was allowed to begin work. The claimant temporarily left the work shift because of a sudden and pressing personal issue at home. Although the claimant made a statement that might lead the employer to conclude he was quitting employment, the claimant returned a few minutes later and resumed work with the approval of the assistant manager who was on duty. The assistant manager did not indicate to Mr. Mathias that he was being discharged, suspended or that a decision on those issues was pending. The assistant manager on duty instead specifically indicated to Mr. Mathias, when he was allowed to resume work, that if it happened again the claimant would be "terminated." Mr. Mathias was allowed to continue to report for scheduled work until he was incarcerated based upon a previous investigation. Mr. McGowen testified that the claimant's discharge was not related in any manner to his absence due to incarceration.

Although aware of the September 20, 2008 incident, a decision was not made to discharge Mr. Mathias from his employment until it was convenient for the employer to do so.

The question before the administrative law judge in this case is not whether the employer had a right to discharge Mr. Mathias but whether the discharge was based upon a current act of misconduct in connection with the work. While the decision to terminate Mr. Mathias may have certainly been a sound decision from a management viewpoint, the evidence in the record establishes the claimant was discharged on September 30, 2008 for a past act. The claimant had been in effect reassured by the assistant manager that his actions on September 20, 2008 did not subject the claimant to discharge. The claimant was allowed to continue working that day and days subsequent and issued a verbal warning that the next time an event of that nature occurred that claimant would be "terminated." The employer's witness testified that there were no further acts related to the claimant's discharge from employment that occurred after September 20, 2008.

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.

871 IAC 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 for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

For the above-stated reasons, the administrative law judge concludes that the claimant was not discharged for a current act of misconduct in connection with his employment.

DECISION:

The representative's decision dated October 16, 2008, reference 01, is reversed. The claimant was dismissed under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs