

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEITH E SLUSHER
Claimant

AJS OF DES MOINES INC
Employer

APPEAL 19A-UI-07516-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/25/19
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Claimant/appellant filed an appeal from the September 13, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 15, 2019, at 2:00 p.m. Claimant participated. Employer participated through Scott Schwiesow, Regional Director of Operations, and Christopher Johnson, General Manager. Employer's Exhibits 1 – 7 were admitted.

ISSUE:

Whether claimant's separation was a discharge due to 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 technician from May 18, 2015 until his employment with AJS of Des Moines, Inc. ended on August 23, 2019. (Schwiesow Testimony) Claimant worked Monday through Friday from 8:00 a.m. until 4:30 p.m. (Schwiesow Testimony) Claimant's direct supervisor was Christopher Johnson, General Manager. (Schwiesow Testimony)

On July 31, 2019, claimant attended a staff meeting wherein he "snapped" at his direct supervisor by raising his voice and using profanity. (Slusher Testimony) In the end of July and beginning of August, employer received complaints from customers that claimant smelled of alcohol while at work. (Johnson Testimony) The exact dates of the complaints are unknown. (Johnson Testimony) Employer began investigating the complaints on August 12, 2019. (Schwiesow Testimony) Employer did not tell claimant about the complaint or the investigation. (Schwiesow Testimony) Claimant continued working during the investigation. (Schwiesow Testimony) On August 23, 2019, employer terminated claimant's employment because of claimant's actions at the staff meeting on July 31, 2019 and due to the customer complaints that claimant smelled of alcohol. (Schwiesow Testimony) Claimant did not know that his job was in jeopardy. (Claimant Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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

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).

Employer must give detailed facts as to the specific reason for claimant's discharge. This includes detailed facts about when the misconduct occurred. However, employer could not provide the dates of customer complaints regarding claimant smelling of alcohol. Employer's estimate is that the most recent complaint occurred in the beginning of August 2019. Employer knew of claimant's conduct at the staff meeting on July 31, 2019. Employer knew of claimant's conduct that led to his termination two to three weeks prior to discharging claimant. Employer did not advise claimant that it was investigating complaints about him or that his job was in jeopardy. Therefore, the acts for which claimant was discharged were no longer current; employer has not met its burden of proving a current act of misconduct. Claimant was discharged for no disqualifying reason. Benefits are allowed if claimant is otherwise eligible.

DECISION:

The September 13, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs