

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MIKEL W KENYON
Claimant

C&W FACILITY SERVICES INC
Employer

APPEAL 18R-UI-12389-NM-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 09/30/18
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 29, 2018, (reference 02) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on January 23, 2019. Claimant participated and testified. Employer did not participate.

ISSUE:

Was the claimant discharged for disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 1, 2018. Claimant last worked as a full-time lead man. Claimant was separated from employment on October 4, 2018, when he was discharged.

On September 13, 2018, while working on the property of his employer's customer, claimant was driving a cart while traveling between buildings. Claimant was smoking at the time. One of the customer's employees flagged claimant down and began yelling that he could not smoke. Claimant said okay, but the employee felt he was being disrespectful and asked his name. Claimant smiled, and responded that his name was Pedro Rodriguez. The employee then got even more upset and escorted claimant to the office, where claimant spoke to supervisor Mark Foreman. Foreman told claimant to leave and meet him by the time clock. Claimant followed this instruction. When Foreman met claimant he told him to clock out and issued him a written disciplinary action, which included a three-day suspension. Claimant had no prior disciplinary history. Claimant went home and later followed up with the human resource department. When claimant spoke to human resources he was told the incident was being investigated and that he should not report to work until he was told to do so. Claimant did not hear anything from the employer until October 4, 2018, when he received a letter informing him he had been separated from employment for insubordination, rudeness, discourtesy, and inappropriate customer interaction on September 13, 2018. Claimant was not previously aware his job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential

liability for unemployment insurance benefits related to that separation. 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 conduct for which claimant was discharged was merely an isolated incident of poor judgment. It is understandable, based on claimant's own account of the September 13, 2018 incident, why the customer's employee thought claimant was being disrespectful. However, claimant had no prior warnings or disciplinary action. He did not use profanity, engage in name calling, nor was his behavior threatening. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

Additionally, there is an argument to be made that final incident for which claimant was discharged was not a current act of misconduct.

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

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 lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). The employer knew about the issue on September 13, 2018, and issued claimant a disciplinary action, with a three-day suspension. The three-day suspension was then prolonged without explanation pending an investigation. Claimant was discharged three weeks later, with no explanation as to why the investigation took so long or why his initial three-day suspension was not sufficient.

DECISION:

The October 29, 2018, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs