

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

PATRICK B KLINE
Claimant

APPEAL NO. 18A-UI-04098-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

OC: 01/14/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Patrick Kline filed a timely appeal from the February 6, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Kline was discharged on January 16, 2018 for insubordination in connection with the employment. After due notice was issued, a hearing was held on April 25, 2018. Mr. Kline participated. Christopher Hunter of Employers Unity represented the employer and presented testimony through Richard Knight, Tasia Jones and Jon Baker. Exhibits 1 through 7 and A through D 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: Patrick Kline was employed by Kinseth Hotel Corporation, d/b/a Holiday Inn in Dubuque, as a part-time banquet set-up person and dishwasher from June 2016 until January 16, 2018, when Richard Knight, Food and Beverage Director, discharged him from the employment. The banquet set-up duties were Mr. Kline's primary duties. Mr. Kline was scheduled to wash dishes about once a week.

The employer provided Mr. Kline with an employee handbook at the start of his employment. The handbook listed infractions that would subject employees to discipline up to discharge from the employment. The list included deliberate violation of work rules or any deliberate failure/refusal to do assigned work, using profane or abusive language, discourtesy, and failure to cooperate.

The final incident that triggered the discharge occurred on Saturday, January 13, 2018. Saturdays are busy days for the employer's food and beverage operations. On that day, Mr. Kline was on the schedule to wash dishes from 3:00 p.m. to 11:00 p.m. Mr. Kline was the only dishwasher on duty during the shift. Mr. Kline was also on the schedule to perform

banquet set-up duties. Mr. Kline was not happy that he was on the schedule to perform both sets of duties. When Mr. Kline arrived for work, he commenced performing the dishwashing duties. A large banquet had just concluded and Mr. Kline had a substantial pile of dishes to clean. At the start of the shift, the restaurant manager told Mr. Kline that he would need to set up a small banquet before he left that evening.

Shortly before 4:00 p.m., Mr. Knight, the Food and Beverage Manager, directed Tasia Jones, Assistant Restaurant Manager, to tell Mr. Kline to join Mr. Knight in the Blue Moon banquet room to discuss another banquet set-up Mr. Knight wanted Mr. Kline to complete that evening. Mr. Kline was upset by the message. Mr. Kline told Ms. Jones "This is bullshit" and "It's not fair." Mr. Kline added that he was scheduled to perform one job and now the employer would have him doing another. Despite Mr. Kline's protest, it was possible for him to get caught up on the dishes, to then step away to do the banquet set-up, and to then return to washing dishes. Ms. Jones counseled Mr. Kline to stay calm and to quietly listen to Mr. Knight. When Mr. Kline and Ms. Jones arrived at the Blue Moon room, Mr. Knight was already there. Jon Baker, a maintenance employee was also present in the room performing his duties. Mr. Knight had a diagram of the room and started to explain to Mr. Kline how he needed Mr. Kline to prepare the room for a banquet scheduled for Monday morning, January 15. Mr. Kline was upset by the idea that he now had a second, larger banquet to set up before he left that evening. Mr. Kline erroneously believed that the combination of duties would keep him at the workplace until well after midnight. Mr. Kline was on the schedule to perform banquet set-up duties the next day. Mr. Kline told Mr. Knight, "I'm not here to fucking set rooms. I'm here to wash dishes today." Mr. Knight told Mr. Kline that Mr. Kline was actually scheduled to do both. Mr. Knight told Mr. Kline that he needed Mr. Kline to get the room set so that it would be ready for Monday morning. Mr. Kline told Mr. Knight that it was "not [his] fucking job" that day and that he would do the banquet set-up the following day. When Mr. Kline continued to protest, Mr. Knight directed him to go home. Mr. Knight subsequently discharged Mr. Kline on January 16, 2018.

In making the decision to end the employment, the employer considered two earlier incidents. The earliest incident dates from May 2017 and consists of an allegation that Mr. Kline failed to follow a supervisor's instructions regarding audio-visual equipment. Mr. Kline was not ordinarily responsible for audio-visual equipment. The employer lacks personal knowledge of that matter.

On Saturday, August 26, 2017, Mr. Kline was scheduled to work banquet set-up and to wash dishes during his 3:00 p.m. to midnight scheduled shift. Mr. Kline finished his banquet set-up duties at 4:25 p.m. Mr. Kline then told a manager that he was "not there to fucking wash dishes." The manager contacted Mr. Knight who then questioned Mr. Kline regarding why he was refusing to wash dishes. Mr. Kline asserted that the employer assigned him too much work and that he was not going to do both banquet set-up and dishwashing. The employer had not assigned too much work. Mr. Knight issued a written reprimand to Mr. Kline in connection with the conduct.

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 based on misconduct in connection with the employment. The misconduct included two incidents wherein Mr. Kline unreasonably employed vulgar language when speaking to a supervisor. The misconduct included two incidents wherein Mr. Kline unreasonably refused to follow a reasonable employer directive to perform assigned work duties. The weight of the evidence establishes that Mr. Kline was both a banquet set-up person and a dishwasher. The weight of the evidence establishes that the employer at times scheduled Mr. Kline to perform both sets of duties during a shift because it was possible to coordinate and complete both sets of duties during the same shift. The weight of the evidence establishes that Mr. Kline was unreasonably inflexible in his approach to his duties in a context that necessitated flexibility. Mr. Kline's conduct constituted insubordination and demonstrated substantial disregard of the employer's interests.

Because the evidence establishes a discharge based on misconduct in connection with the employment, Mr. Kline is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Kline must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The February 6, 2018, reference 01, decision is affirmed. The claimant was discharged on January 16, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs