

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RICHARD P PALMER
Claimant

FT DODGE CORRECTIONAL FACILITY
Employer

APPEAL 17A-UI-10676-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/24/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 11, 2017, (reference 01) unemployment insurance decision that denied benefits based on his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on November 3, 2017. The claimant participated and testified. The employer participated through Hearing Representative Sandra Linsin and witnesses Robert Johnson and Don Harris. Employer's Exhibits 1 through 3 and claimant's Exhibits A through E were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a correctional officer from June 28, 2017, until this employment ended on September 22, 2017, when he was discharged.

On June 29, 2017, claimant was observed by an undercover police officer purchasing illegal steroids in a parking lot and was detained. Claimant immediately self-reported the situation to his immediate supervisor and was placed on paid administrative leave the following day. Such conduct violates several of the employer's policies including those which require employees to follow all laws, avoid any behavior that could cause the public to lose confidence in the agency, and prohibit the exchange or sale of illegal drugs. (Exhibit 2). Claimant was told by Warden Robert Johnson that the employer would have to investigate the matter thoroughly, but would try to impose the least severe punishment possible. Claimant was never told that the investigation could result in him being discharged from employment. (Exhibit B).

On September 1, 2017, the employer began its investigation into claimant's conduct. Johnson testified the employer did not begin the investigation sooner because it was waiting on law enforcement to complete a chemical analysis result on the substance seized. When the analysis still had not been completed by September 1, the employer decided to begin its investigation anyway. The first thing the employer did was interview claimant. During his

interview claimant admitted he had been attempting to purchase illegal steroids. The employer also conducted a criminal background search on the claimant and reached out to other correctional facilities to see if they had dealt with similar situations. All information collected was then passed along to the central office and Department of Administrative Services, so a decision could be made on appropriate disciplinary action. On September 22, the decision was made to terminate claimant's employment. (Exhibit 1). The employer still had not received the chemical analysis results at the time this decision was made.

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.

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 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). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. __-__, (Iowa Ct. App. filed __, 1986). The employer knew about the issue on June 29, 2017. The employer made a business decision not to begin an investigation into the matter until September 1, 2017, at which time claimant freely admitted to the conduct he had previously self-reported to the employer in June. The employer then waited another three weeks to actually discharge claimant from employment. Claimant was never advised he could be subject to termination. By the time claimant was actually terminated the act for which the he was discharged was no longer current, as it had occurred nearly three months prior. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed.

DECISION:

The October 11, 2017, (reference 01) 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