

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM R BOWKER
Claimant

APPEAL NO. 10A-UI-04109-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF FORT MADISON
Employer

OC: 02/21/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William Bowker filed a timely appeal from the March 18, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 29, 2010 and concluded on July 20, 2010. Mr. Bowker participated personally was represented by attorney Curtis Dial. Attorney Patrick O'Connell represented the employer and presented testimony through Byron Smith, City Manager, and Adam Cates, Police Officer. Exhibits One and Two were received into evidence.

ISSUES:

Whether Mr. Bowker was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Bowker was employed by the City of Fort Madison as a full-time Patrol Officer for ten years until February 25, 2010, when Byron Smith, City Manager, discharged him from the employment. Captain Bill Kester was Mr. Bowker's immediate supervisor. Bruce Niggemeier was Chief of Police during the final two years of Mr. Bowker's employment.

Mr. Bowker was assigned to the Lee County Narcotics Task Force until January 2009, when the unit commander, Captain Dave Hinton of the Keokuk Police Department, removed him from the Task Force due to multiple concerns regarding his work performance. Mr. Bowker's immediate supervisor on the three-member Task Force was Keokuk Detective Brian Dupris. While assigned to the Task Force, Mr. Bowker slept on duty seven times between July 21, 2008 and December 1, 2008. While on the Task Force, Mr. Bowker on one occasion left his post without authorization, failed to answer his phone on one occasion, and engaged in unauthorized personal use of Task Force computers. While on the Task Force, on one occasion Mr. Bowker was unable to report for on-call duty because he had consumed alcohol at a party. While on the Task Force, Mr. Bowker refused to attend a search warrant writing class. All of these issues

were known to the unit commander and factored into his decision to remove Mr. Bowker from the Task Force. The Task Force was an autonomous command unit and the unit commander was under no obligation to consult with the Fort Dodge Police Department concerning the particular reason or reasons prompting Mr. Bowker's removal from the Task Force. However, the unit commander did provide Chief Niggemeier with information concerning why Mr. Bowker was being removed from the task force and Mr. Niggemeier elected not to investigate further.

In May or June 2009, Mr. Bowker commenced an extra-marital affair with Christine Niggemeier, who was at that time married to and residing with Police Chief Niggemeier. Ms. Niggemeier also worked for the Fort Dodge Police Department as an unpaid volunteer auxiliary officer. Mr. Bowker had no supervisory authority over Ms. Niggemeier's work and was never on patrol with Ms. Niggemeier. Mr. Bowker's personal relationship with Ms. Niggemeier occurred entirely outside work. Ms. Niggemeier separated from Chief Niggemeier at about the time her affair with Mr. Bowker began. In June 2009, another officer reported the affair to Chief Niggemeier, who telephoned Mr. Bowker to ask whether Mr. Bowker was having an affair with Ms. Niggemeier. Mr. Bowker denied the affair during his conversation with the Chief. Ms. Niggemeier had previously indicated to Mr. Bowker that she wanted to be the person to tell her husband of the affair and wanted to delay doing so until she had obtained an attorney to assist with a dissolution of marriage.

In July 2009, Chief Niggemeier reported the affair to Byron Smith, City Manager. Mr. Smith assigned Captain Rob Hogan and Policar Office Adam Cates to conduct an investigation into the matter. Officer Cates conducted surveillance that confirmed the affair. The investigation into the affair was complete by the middle of August and Mr. Smith had received a formal report concerning the surveillance and individuals Officer Cates had interviewed. Mr. Smith issued formal notice to Mr. Bowker directing him to meet for an administrative interview on August 18, 2009. The notice cited various administrative rules Mr. Smith believed Mr. Bowker had violated. The notice did not direct Mr. Bowker to end the affair and did not notify him he would be subject to discharge from the employment based on the affair. On August 18, 2009, Mr. Bowker appeared as directed and was interviewed by Officer Cates. Mr. Bowker signed acknowledgment of his obligation to answer truthfully and fully or face discipline up to termination. Mr. Bowker was truthful in his responses to the questions put to him at the interview. Mr. Bowker admitted the affair with Ms. Niggemeier and admitted he had not been truthful with Chief Niggemeier back in June when asked about the affair. On August 18, Officer Cates delivered his report concerning the interview with Mr. Bowker to Captain Hogan.

Once the investigation into the affair was complete, Mr. Smith decided to revisit Mr. Bowker's January 2009 discharge from the Lee County Narcotics Task Force.

In early October 2009, Captain Hogan directed Officer Cates to conduct further investigation concerning Mr. Bowker's removal from the Lee County Narcotics Task Force. On October 22, 2009, Officer Cates interviewed Mr. Bowker's estranged wife, Courtney Timmerman, about Mr. Bowker's alleged leaking information a year earlier regarding the basis for another officer's removal from the Task Force. Ms. Timmerman asserted that Mr. Bowker had provided information to her concerning the officer, but did not indicate when Mr. Bowker had allegedly shared the information.

At some point Mr. Smith enlisted the assistance of Lee County Sheriff Buck Jones. Sheriff Jones interviewed Mr. Bowker in January concerning the Task Force issues.

Mr. Bowker continued to perform his regular duties until he was discharged from the employment. On February 25, 2010, Mr. Smith presented Mr. Bowker with a formal Notice of

Termination. This was the first time the employer had provided notice to Mr. Bowker that the affair with Ms. Niggemeier placed his employment in jeopardy. The Notice also referenced a laundry list of administrative rules and canons Mr. Bowker had violated while on the Task Force and in connection with the extramarital affair.

REASONING AND CONCLUSIONS OF LAW:

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.

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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record fails to establish a current act of misconduct. See 871 IAC 24.32(8). The weight of the evidence indicates that Chief Niggemeier knew in January 2009 that Mr. Bowker had been discharged from the Task Force for misconduct. Despite that information, Chief Niggemeier elected not to further look into the matters or take any additional disciplinary action against Mr. Bowker. City Manager Byron Smith's decision to resurrect the Task Force issues nine or ten months later cannot make those past acts of misconduct into current acts of misconduct for unemployment insurance purposes in connection with a discharge that occurred more than a year after Mr. Bowker's removal from the Task Force. With regard to the affair, the employer had completed its investigation into that matter as of August 18, 2009, but failed to notify Mr. Bowker that he faced discharge in connection with the affair until February 25, 2010. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider any of the conduct in question or whether it actually constituted misconduct. See 871 IAC 24.32(8).

Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Bowker was discharged for no disqualifying reason. Accordingly, Mr. Bowker is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Bowker.

DECISION:

The Agency representative's March 18, 2010, reference 01, decision is reversed. The discharge was not based on a current act of misconduct. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw