IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEREMY A MYERS
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL NO. 09O-UI-14646-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/07/09
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 2, 2009 (reference 01) decision that allowed benefits. Pursuant to EAB remand order (which did not vacate the earlier ALJ's decision denying benefits) due notice was issued, a telephone conference hearing was held on October 28, 2009. Claimant participated. Employer participated through associate director of public safety Bill Searle and human resources associate Mary Eggenburg.

ISSUE:

The issue is whether the final act of misconduct for which claimant was discharged was current.

FINDINGS OF FACT:

Inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the July 30, 2009 administrative law judge's findings of fact in appeal number 09A-UI-09919-DWT is hereby adopted and incorporated herein as the findings of fact for appeal number 09O-UI-14646-LT. To that this ALJ adds the following findings of fact: Claimant was separated on June 5, 2009 for a final incident that occurred on May 22. On May 19 claimant was arrested for off-duty conduct. Friedoff told him on May 20 that there would be an investigation and his job may be in jeopardy as a result. On May 22 supervisor Ken Friedoff noticed a dorm door was left open and spoke to claimant during that shift to point out the open door and explain the importance of securing the building but did not indicate his job was in jeopardy or that there would be an investigation. On May 26 Friedoff and Scott met with claimant about the May 19 arrest and told him he would be suspended for three days without pay but those dates would be set in the future because of scheduling issues. They did not mention the May 22 issue or an investigation. Employer is uncertain about the date but knows that the May 22 incident was not addressed in any form until after the May 26 meeting to suspend claimant for the May 19 arrest. Shortly before June 3 claimant told Friedoff he feared his job was in jeopardy because of the two issues occurring within a short time frame. Friedoff told him his job was not in jeopardy. Scott called a meeting on June 3 and he and Friedoff interviewed the claimant and told him the matter was being investigated. Claimant was not scheduled to work June 4 and when he reported to work on June 5 he was instructed to report to Searle's office and was fired. Searle is not certain when the information about the May 22

incident was given to him or when he contacted an attorney but knows he obtained the advice of the attorney during the same conversation to discharge claimant and soon instructed Scott or Friedoff to write the letter of termination. Although claimant told Searle at termination he had hoped for a five-day suspension but thought he may be terminated, June 3 was the first notice his job may be in jeopardy because of the May 22 issue.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the July 30, 2009 administrative law judge's reasoning in appeal number 09A-UI-09919-DWT is hereby adopted and incorporated herein as the reasoning for appeal number 09O-UI-14646-LT. To that this ALJ adds the following reasoning:

871 IAC 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 upon such past act or acts. The termination of employment must be based upon 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." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

Although the claimant did engage in a final act of misconduct by his failure to ensure the dormitory door was secure, inasmuch as employer knew of the incident the same day, did not advise the claimant it was an issue that would be investigated until 12 days later, fired the claimant an additional two days after that, and delayed only to complete another investigation and disciplinary process (May 19 through May 26), the act for which the claimant was discharged was no longer current.

Inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the July 30, 2009 administrative law judge's conclusion of law in appeal number 09A-UI-09919-DWT is hereby adopted and incorporated herein as the conclusion of law for appeal number 09O-UI-14646-LT to the extent that the claimant was discharged due to job related misconduct. To that this ALJ adds the following conclusion of law: 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:

Inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, this ALJ is not authorized to affirm the representative's decision or reverse the July 30,

2009 administrative law judge's decision in appeal number 09A-UI-09919-DWT. This ALJ does recommend the final agency decision allow benefits, provided the claimant is otherwise eligible, based upon the lack of a current final act of misconduct.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs