

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JAMES L DEMANOVICH
Claimant

APPEAL NO. 14A-UI-07241-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AJS OF DES MOINES INC
Employer

OC: 06/15/14
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 7, 2014, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 6, 2014. Claimant participated personally and was represented by Sarah Laughlin. Employer participated by Doug Fulton. Claimant's Exhibits A through C and Employer's Exhibits One through Ten were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on June 13, 2014. Employer discharged claimant on June 13, 2014 because of claimant's alleged actions in sending in what was believed to be samples from an area other than the home being treated.

Employer had claimant put in a bid on a project and then oversee the cleaning of a moldy and damaged home. Claimant was trained to collect mold samples to ensure that cleanup work was done to satisfactory levels. This was not claimant's main duty for employer, but he had used this training to do testing at least nine times in the last five years.

When a residence or business is cleaned of mold, that property is tested to make sure that there are not dangerous levels of mold spores that remain in the area. As the normal third party tester was busy, claimant was asked by employer to do the testing on the project he'd been cleaning. Claimant stated that he was not comfortable with doing this, as guidelines dictate that a third party is to do the testing to determine if remediation is done to proper standards.

Claimant stated that he drove his own car over to the residence to conduct the testing so that the owner wouldn't see a Servicemaster truck conducting the testing when Servicemaster had done the cleaning. Claimant stated that the property owner was savvy and would have known that the testing was being done in violation of regulations which require testing to be done by a third party. Claimant had one of the coowners of employer's company approve his driving of his

own car over to the residence to be tested. This was not approved by other owners, who had GPS units installed on all of the Servicemaster vans such that they would know where employees were at all times.

Claimant's testing showed a home within all guidelines for mold remediation. Employer was not pleased that claimant took his own car and when he went to visit the home, saw a house that didn't appear to be in a condition that would warrant using testing equipment. (Testing is not normally done when a place is dirty, or has obvious mold, as it would just cost the homeowner extra money to do the test when the house wasn't ready as it would be more likely to fail.) Employer decided to retest six days after the first test had been conducted. Employer used the regular tester to conduct this test and then did another test after the second test. Both the second and third test showed extraordinary amounts of molds that didn't even register in the first test.

When employer saw these test results, he believed that the test hadn't been conducted at the house where the work was being done. Experts in the field of mold growth and remediation stated that the types of mold which were present in very high concentration that hadn't appeared in the first test take 21 to 30 days to grow to a detectable state, so the measurements wouldn't have been taken at the same place.

Claimant showed that subsequent testing took place nearly a week after the first test. During that week, there had been many workers at the house who had dirtied the residence. Additionally, claimant stated that employer had previously used a dehumidifier that presumably had the effect of getting mold spores into the air where they hadn't been previously. There was a dehumidifier in use at the house.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

Iowa Admin. Code r. 871-24.32(4), (8) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

(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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The importance of this issue, to the administrative law judge, lies in the fact that the high levels of black mold and other dangerous fungi were found that could have been injurious to the clients and to the reputation of employer.

In cases of alleged misconduct such as this, an employer has the burden of proving a claimant is disqualified for benefits because of misconduct. Henecke v. Iowa Div. of Job Serv., 533 N.W.2d 573, 575 (Iowa Ct. App. 1995). In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning testing procedures and protocol. Employer brought in multiple outside parties, one of whom had no connection at all to the employer or the case at hand, and both experts in the field explained how the sample taken by claimant was simply inconsistent with the other samples taken from the supposedly same house.

The incident which brought about the discharge, constitutes misconduct because the claimant is charged with fulfilling a request as a part of his job. Claimant knew that he was to test the house in question and employer has met his burden of proof in showing that the samples taken by claimant were not taken from the same area as the other samples taken – even if they were taken six days apart. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated July 7, 2014, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/can