

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GEORGE E JOHNSON

Claimant

APPEAL NO. 10A-UI-04316-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TW RESTORATION INC

SERVPRO OF DES MOINES SW & E

Employer

OC: 02/07/10

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 9, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 4, 2010. Claimant George Johnson participated. Brian Burkle, Operations Manager, represented the employer.

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: George Johnson was employed by TW Restoration, Inc., doing business as Servpro of Des Moines from December 2008 until December 11, 2009, when Brian Burkle, Operations Manager, discharged him due to unsatisfactory work performance. At the time of hire, Mr. Johnson's title was production manager and was paid \$17.00 per hour. Mr. Johnson lacked the ability to perform that position to the employer's satisfaction, so the employer demoted him to crew chief in September 2009. The employer halved the number of staff Mr. Johnson supervised and reduced Mr. Johnson's wage to \$15.00 per hour. On December 11, 2009, the employer told Mr. Johnson that that he would have to accept a further demotion to production technician and accept a further pay cut to \$12.00 or face discharge from the employment. The employer's actions were motivated in part by the employer's knowledge that Mr. Johnson had spoken to a competitor about possible employment. Mr. Johnson told the employer he could not afford the further pay cut. The employer invited Mr. Johnson to quit, but Mr. Johnson told the employer he was not quitting the employment. The employer then discharged Mr. Johnson from the employment.

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 weight of the evidence in the record establishes that Mr. Johnson performed his duties to the best of his ability, but could not perform to the satisfaction of the employer. This would not constituted misconduct in connection with the employment. The evidence fails to establish that Mr. Johnson misled the employer about his qualifications. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Johnson was discharged for no disqualifying reason. Accordingly, Mr. Johnson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Johnson.

Though the weight of the evidence did not establish a voluntary quit, had Mr. Johnson elected to voluntarily quit the employment rather than accept the further demotion and pay cut, the quit would have been for good cause attributable to the employer, given the substantial change in the conditions of the employment. See Iowa Code section 96.5(1) and 871 IAC 24.26(1).

DECISION:

The Agency representative's March 9, 2010, reference 02, decision is affirmed. 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/css