

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOELLEN J MEAD
Claimant

ARAMARK UNIFORM & CAREER APPAREL
Employer

APPEAL 15A-UI-04654-KC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 09, 2015 (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on May 26, 2015. The claimant participated. The employer participated through Jeannie McNamee, merchandise control manager. No documents were admitted 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: The claimant was employed full time as a production operator and was separated from employment on March 24, 2015; when the employer terminated her employment. John Waggoner, production manager, made the decision to terminate the claimant's employment.

The claimant began work at 5:00 a.m. on March 24, 2015. She does not work in close proximity with other workers during every hour of her shift. During that morning, McNamee, who does not supervise the claimant, spoke with her. McNamee thought she smelled alcohol and heard slurred speech. McNamee reported her observations to production manager John Wagner, one of the claimant's supervisors. Approximately two to three hours after she started working, the claimant was called to Wagner's office. When questioned, the claimant denied being under the influence of alcohol. She last consumed alcohol at approximately 11:30 p.m. the previous night. The employer administered no urine, blood, or Breathalyzer drug tests. The employer wanted the claimant to have someone drive her home or the police would be called. The claimant indicated she had no other way home. Consequently, the employer called local police and police officer Weldon administered a field sobriety test. He moved a finger in front of the claimant's face. Wagner told the claimant she was suspended until further notice. Officer Weldon drove the claimant home from work. No charges were filed. The claimant's employment was terminated on March 27, 2015.

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 § 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, (4), and (8) 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).

(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.

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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).

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. The employer provided no evidence of its policy.

The supervisor, who made the termination decision and had direct knowledge of the situation, was listed as a witness but was unavailable to testify due to an emergency situation. No request to continue the hearing was made and no written statements of the supervisor were offered. The employer did not submit a copy of the policy at issue. The employer bears the burden of proof in discharge for misconduct. The employer's witness McNamee provided testimony that was refuted by the claimant.

Iowa Code § 730.5 allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory test before taking disciplinary action against an employee. Upon a positive drug screen, Iowa Code § 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive drug test. The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

The employer did not provide objective evidence that the claimant worked under the influence of alcohol. No scientific tests were conducted, no employer drug policy was provided, and no criminal charges were filed. If the employer relied on a field sobriety test administered by a police officer, who did not charge the claimant with public intoxication or other drug-related violation, as the basis of the termination, the employer did not demonstrate a sufficient basis for exclusion from unemployment insurance benefits due to working under the influence of alcohol.

The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

DECISION:

The April 9, 2015 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Kristin A. Collinson
Administrative Law Judge

Decision Dated and Mailed

kac/can