

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CLAIMANT

APPEAL 16A-UI-11877-LJ

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER

**OC: 10/02/16
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 25, 2016, (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for wanton carelessness in performing his job. The parties were properly notified of the hearing. An in-person hearing was held in Des Moines, Iowa, on November 22, 2016. The claimant participated, and was represented by an attorney. The employer participated through Transportation Security Manager and Human Resources Specialist. Claimant's Exhibit 1 was received and admitted into the record.

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: Claimant was employed full time, most recently as a transportation security officer, from approximately November 17, 2002 until September 27, 2016, when he was discharged for failing to follow standard operating procedures.

The final incident occurred on August 31, 2016, when claimant failed to follow a standard operating procedure. Claimant admits he made this error. He testified this was an accident. Claimant had prior corrective actions related to his work performance. On August 24, claimant failed to follow an appropriate standard operating procedure. After this incident, claimant was pulled from his position and given remediation. On July 29, 2016, claimant failed to follow the appropriate standard operating procedure. In a written statement claimant provided after the incident, claimant stated he knew the correct procedure and had no explanation for his error that day.

Claimant admits he received training in his position. Claimant testified that in his position, he rotated through various stations throughout the workday. Each of the positions in which he failed to follow the standard operating procedures was one of claimant's standard stations.

After the final incident, the employer gave claimant remediation. Claimant continued to work after this date, but he was not allowed to work in two of the positions in which he violated the standard operating procedure. On August 31, claimant had a pre-decisional discussion with the employer. After that, the employer conducted a fact-finding to determine what, if any, discipline was appropriate.

On September 8, the employer notified claimant that it was proposing to remove him from his position and discharge him from employment. As of this date, claimant was placed on paid leave. He was required to report to work as scheduled, but he did not perform any work tasks. Claimant responded to this notice on or about September 14, proposing he be placed on a last chance agreement in lieu of removal and discharge. The employer responded to claimant's proposal, and claimant received another opportunity to respond with an alternative to removal and discharge. After additional discussion, claimant was discharged from employment effective September 26, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

The first issue in this case is the effect of the non-disclosure and confidentiality requirements of the federal law. The Office of the Secretary of Transportation has prescribed regulations for the maintenance, safeguarding, and disclosure of records of information that the Secretary of the Department of Transportation has determined to be Sensitive Security Information to prescribe regulations for testing of commercial motor vehicle operators. 49 CFR 15.1. Sensitive Security Information, or "SSI," is defined as follows:

[I]nformation obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Secretary of DOT has determined would—

- (1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);
- (2) Reveal trade secrets or privileged or confidential information obtained from any person; or
- (3) Be detrimental to transportation safety.

49 C.F.R. 15.5(a). The federal regulation lists numerous items as constituting SSI, including security programs and contingency plans; vulnerability assessments; security inspection information; security measures; security screening information; and security training materials. 49 C.F.R. 15.5(b). The administrative law judge finds that substantial portions of claimant's Exhibit 1 qualify as SSI. Further, the administrative law judge finds that this decision must not be disclosed except as permitted by federal law and this decision must be marked in compliance with the federal requirements 49 C.F.R. 1520.9 & 1520.13

This federal non-disclosure and confidentiality provision must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). Iowa Code § 22.2(1) provides: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." The exhibits, decision, and audio recording in an unemployment insurance case would meet the definition of "public record" under Iowa Code § 22.1-3. Iowa

Code § 17A.12(7) provides that contested case hearings “shall be open to the public.” Under Iowa Code § 96.6(3), unemployment insurance appeals hearings are to be conducted pursuant to the provisions of chapter 17A. The unemployment insurance rules provide that copies of all presiding officer decisions shall be kept on file for public inspection at the administrative office of the department of workforce development. Iowa Admin. Code r. 871-26.17(3).

The federal non-disclosure and confidentiality laws regarding SSI must be followed because, under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that “interfere with, or are contrary to the laws of congress, made in pursuance of the constitution” are invalid. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). One way that federal law may pre-empt state law is when state and federal law actually conflict. Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 605. Although the general principle of confidentiality is set forth in a federal statute (49 USC § 31306(c)(7)), the specific implementing requirements are spelled out in the federal regulation (49 CFR 40.321). The United States Supreme Court has further ruled that “[f]ederal regulations have no less preemptive effect than federal statutes.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (ruling that federal regulation of cable television pre-empted Oklahoma law restricting liquor advertising on cable television, and Oklahoma law conflicted with specific federal regulations and was an obstacle to Congress’ objectives).

In this case, the Iowa Open Records law, APA, and Employment Security law actually conflict with Part 15 of Title 49 of the Code of Federal Regulations to the extent that they would require the release of SSI to non-covered persons not a party to the case. It would defeat the purpose of the federal law of providing confidentiality to permit SSI to be disclosed to the general public. Therefore, the public decision in this case will be issued without identifying information and without specific reference to any SSI. A decision with identifying information will be issued to the parties; but that decision, the audio record, and any documents in the administrative file (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

The next issue is whether claimant was discharged from employment for disqualifying, job-related misconduct. 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(8) provides:

- (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.

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.” Where an

employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). Here, claimant was given notice of the employer's intent to seek his removal and discharge on September 8, only eight days after the final incident occurred. Claimant was ultimately discharged on September 27, after several weeks of administrative proceedings related to the employer's removal and discharge of claimant. The administrative law judge finds that as claimant was notified on September 8 of the employer's intent to remove and discharge him, claimant's discharge was based on a current act of misconduct.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In claimant's position as a transportation security officer, he was one of the people responsible for ensuring the safety of airplane passengers. This position requires a higher standard of care than most employment positions, as the employer is charged under federal law with protecting transportation systems throughout the United States. In just over one month, claimant committed three errors in performing his work that establish a pattern of negligence in disregard of his employer's interests. Claimant's recurrent negligence could have jeopardized the safety

and security of passengers, employees, and cargo aboard aircraft. The employer has established that claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

DECISION:

The October 25, 2016, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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