

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A SCOTT
Claimant

APPEAL NO. 12A-UI-00273-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IA DEPT OF CORRECTIONS/FT MADISON
Employer

OC: 12/04/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 29, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 15, 2012. Claimant Michael Scott participated and presented additional testimony through Lynn Hartsock, Diane Gervler and Mike Gehle. Tom Kuiper of TALX represented the employer and presented testimony through Phyllis Porter and Deb Nichols. Exhibits One, Two, A, B and C were received into evidence.

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: Michael Scott was employed by the Iowa Department of Corrections as a full-time correctional officer from 1997 until December 2, 2011, when he was discharged from the employment for assaulting an inmate. At the end of his employment, Mr. Scott was assigned to the Clinical Care Unit (CCU) at the Iowa State Penitentiary. Correctional Officer Mike Gehle was Mr. Scott's shift partner on that unit. The CCU housed inmates with mental health issues. The unit was distinguished from other units by the inmates' greater access to mental health professionals. The inmates in that unit were not placed there because any increased predisposition to violence. Donald Kestner was one of the inmates in the CCU. Mr. Kestner was serving a sentence for a non-violent offense. Mr. Kestner did not have a history of assaultive behavior at the facility. Mr. Kestner had been involved in a couple fights during his time at the Iowa State Penitentiary. Neither of those fights involved a correctional officer.

On the morning of November 9, 2011, Mr. Scott and Mr. Gehle were manning the control desk in the CCU. One or both officers observed Mr. Kestner speaking to an inmate who was locked in his cell, which was a violation of the unit protocol. The officers summoned Mr. Kestner to the control desk. Rather than stop at correcting Mr. Kestner's violation of the rule about speaking to locked inmates, Mr. Gehle—and Mr. Scott, to a lesser extent—made demeaning statements to

Mr. Kestner that escalated the verbal interaction. When Mr. Gehle had had enough of the exchange, he ordered Mr. Kestner to his cell. Mr. Kestner initially kept up his part of the verbal sparring match, but soon headed in the direction of his cell. Mr. Scott followed behind at a distance. Mr. Kestner paused at one or more points to direct further statements to Mr. Gehle who had remained at the control desk. When Mr. Scott got closer to Mr. Kestner to further escort him to his cell, Mr. Kestner put his arms behind his back in the position they would be in if had been placed restraints. Mr. Kestner's conduct at that point communicated that he was no threat to Mr. Scott and that he intended to cooperate with being escorted to his cell.

Mr. Kestner did in fact cooperate with being escorted to his cell. After Mr. Scott was in his cell and as the door was sliding shut, Mr. Kestner brought just his head and a portion of his arm outside the door opening and directed his attention back at Mr. Gehle, who was still seated at the control table. The video of the incident suggests that Mr. Gehle and Mr. Kestner were both still engaged in the verbal sparring match and that Mr. Kestner was attempting only to get the last word in. Mr. Kestner was turned entirely in the direction of Mr. Gehle. Mr. Kestner was not turned toward Mr. Scott, who was standing in front of the cell door. Mr. Kestner was not in fact directing any of his attention to Mr. Scott. At that point, as the door was closing, Mr. Scott took the opportunity to raise his leg and, with great force, kick Mr. Kestner further into his cell. Mr. Scott's aggressive move was not provoked by any showing of physical aggression on the part of Mr. Kestner. Mr. Scott's act was in no manner self-defensive in nature. Mr. Scott's action is readily recognizable on the video surveillance record as an unprovoked act of violence directed at Mr. Kestner. Mr. Scott's foot made contact with Mr. Kestner's hip. The door to Mr. Kestner's cell then full closed.

Unit Manager Steve Young entered the CCU at about the time that Mr. Gehle directed Mr. Kestner to his cell. Mr. Young observed Mr. Scott escorting Mr. Kestner to his cell. Mr. Young observed Mr. Scott in the process of kicking Mr. Kestner, Mr. Young yelled at Mr. Scott, "Stop, don't, you can't do that!" Very shortly thereafter, Mr. Young reported the incident up the chain of command.

Mr. Scott did not prepare an incident report concerning his interaction with Mr. Kestner. Mr. Gehle prepared a report that intentionally misstated the incident so as to falsely portray Mr. Kestner as the instigator of the verbal exchange, to falsely portray Mr. Kestner as having been a threat to Mr. Scott, and to falsely portray Mr. Scott's assaultive conduct as having been in self-defense. Mr. Gehle and Mr. Scott both reviewed and signed off on the report.

On November 10, the employer suspended Mr. Scott with pay pending completing of an investigation into the incident. The employer had pulled Mr. Kestner from the unit. The employer also temporarily reassigned Mr. Gehle. The employer assigned an investigator to investigate the incident. During the period of November 22-29, the investigator interviewed several individuals including Mr. Scott, Mr. Gehle, Mr. Kestner, Mr. Young, and Correctional Counselor Lynn Hartsock. The employer then forwarded the investigation materials along with its recommendation for Mr. Scott's removal to Des Moines for higher review. On December 1, the employer received word from Des Moines that the proposed discharge has been approved. On December 2, 2011, the employer notified Mr. Scott of the discharge.

Mr. Scott's performance of his correctional officer duties was governed by state and federal laws concerning treatment of inmates. These included laws concerning use of reasonable force and prohibiting use of excessive or unreasonable force. The employer's work rules required obedience to those laws. Through his assaultive conduct, Mr. Scott violated multiple work rules regarding lawful, ethical

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 evidence in the record establishes that Mr. Scott was discharged from the employment after he used excessive force against an inmate in violation of the employer's established work rules and various laws that governed his interactions with inmates. The weight of the evidence indicates that Mr. Scott made an unprovoked assault upon the inmate. The inmate was in no way a threat to Mr. Scott and Mr. Scott's actions were not in self-defense or defense of another. After Mr. Scott was observed by a colleague assaulting the inmate, Mr. Scott and the other officer who had instigated and escalated the situation with the inmate made a bogus report to the employer concerning the basis for the physical contact and the events leading up to the physical contact.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Scott was discharged for misconduct. Accordingly, Mr. Scott is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Scott.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's December 29, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css