

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES E POLLARD
Claimant

APPEAL NO. 17A-UI-02452-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GPM INVESTMENTS LLC
Employer

OC: 01/29/17
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 February 24, 2017, reference 04, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on January 25, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on March 28, 2017. Claimant James Pollard participated. Kim Fielder represented the employer. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant and received Exhibits 1, 2 and 3 into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: James Pollard was employed by GPM Investments, L.L.C., d/b/a Gas Mart in Marion, as a part-time overnight cashier from April 2016 until January 27, 2017, when Kim Fielder, District Manager, discharged him from the employment for failing to appear for meetings set for 7:00 a.m. on January 25, 2017 and 7:00 a.m. on January 27, 2017. On or before January 23, 2017, the employer completed an audit of the convenience store where Mr. Pollard worked and discovered an \$8,500.00 shortage. On January 23, Ms. Fielder commenced an investigation into the shortage by directing Susan Merrifield, Store Manager, to schedule investigatory meetings with the store employees.

On January 23, Ms. Merrifield told Mr. Pollard that his meeting with Ms. Fielder was set for 7:00 a.m. on January 25, 2017. Ms. Merrifield told Mr. Pollard that it was important that he appear for the meeting regarding the audit. At the time Ms. Merrifield told Mr. Pollard about the meeting, Mr. Pollard told Ms. Merrifield that he could not appear for a meeting at the 7:00 a.m. on January 25 because his other employment, a teaching job, started at 7:00 a.m. Mr. Pollard's usual work hours at Gas Mart were 11:00 p.m. to 6:00 a.m., Sunday evening through Thursday

morning. Mr. Pollard had previously discussed with Ms. Merrifield his need to leave Gas Mart promptly at 6:00 a.m. so that he could prepare to teach a class that started at 7:00 a.m. Mr. Pollard did not appear for the meeting set for 7:00 a.m. on January 25. Mr. Pollard appeared for work later that day and worked the overnight shift.

Ms. Fielder considered discharging Mr. Pollard from the employment based on his failure to appear for the January 25 meeting, but decided to reschedule the meeting to 7:00 a.m. on Friday, January 27. Ms. Fielder again delegated to Ms. Merrifield the task of notifying Mr. Pollard of the meeting set for 7:00 a.m. on January 27. However, Ms. Merrifield did not notify Mr. Pollard of the meeting. Had Ms. Merrifield notified Mr. Pollard of the meeting, Mr. Pollard would still have been unavailable for at a meeting at that particular time due to his teaching duties and the class that began at 7:00 a.m. Mr. Pollard did not appear for the meeting set for 7:00 a.m. on January 27.

Between 8:30 and 9:00 a.m. on January 27, Ms. Fielder telephoned Mr. Pollard and left a voice mail message for him. In the message, Ms. Fielder stated that Mr. Pollard was being removed from the work schedule. Ms. Fielder directed Mr. Pollard to call her. Within 15 minutes of the call, Mr. Pollard returned Ms. Fielder's call and left a voice mail message. Mr. Pollard stated in his message that she should not return his call at that time and that she should instead contact him during his usual work hours of 11:00 p.m. to 6:00 a.m. Ms. Fielder called Mr. Pollard's number again and left a message indicating that she was not going to call Mr. Pollard during his overnight work hours. Ms. Fielder asked Mr. Pollard to call her back. Mr. Pollard did not return the call. When Mr. Pollard did not make further contact with Ms. Fielder on that day, Ms. Fielder decided to discharge Mr. Pollard from the employment. However, Mr. Pollard and Ms. Fielder had no further direct contact until they participated in the unemployment insurance fact-finding interview on February 23, 2017.

On February 9, 2017, Ms. Merrifield documented Mr. Pollard's employment had terminated on January 27, 2017. In one area of the documentation, Ms. Merrifield characterized the separation as involuntary. Later in the same document, Ms. Merrifield documented a voluntary separation based on a failure to report for work. In the comment section of the form, Ms. Merrifield wrote: "Jim missed two meetings dates and times [.] Kim called him on Friday January 27th to talk to him. Took off schedule."

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).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record establishes a January 27, 2017 discharge for no disqualifying reason. While the employer reasonable expected to move forward with its investigation of the inventory shortage, the employer unreasonably expected Mr. Pollard to

appear for a meeting at 7:00 a.m. on January 25. The weight of the evidence establishes that Ms. Merrifield knew that Mr. Pollard had other employment that started at 7:00 a.m. on January 25. The nature of the other employment prevented Mr. Pollard from being able to be absent on short notice. Mr. Pollard provided notice on January 23 that he could not and would not appear for a meeting at 7:00 a.m. on January 25. Mr. Pollard had a reasonable basis for not meeting with the employer at that time. The employer has presented insufficient evidence to rebut Mr. Pollard's testimony that he was never informed of the meeting set for 7:00 a.m. on January 27. Had he known of that meeting, his other employment would have again provided a reasonable basis for not appearing for a meeting at that time. When Mr. Pollard did not appear for the meeting on January 27, Ms. Fielder elected to remove him from the work schedule. By that act, Ms. Fielder effectively discharged Mr. Pollard from the employment.

Because Mr. Pollard was discharged for no disqualifying reason, he is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 24, 2017, reference 04, decision is affirmed. The claimant was discharged on January 27, 2017 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/rvs