

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

GEORGE W RANDELL
Claimant

APPEAL NO. 18A-UI-07267-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARSDEN BLDG MAINTENTANCE LLC
Employer

OC: 06/03/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

George Randell filed a timely appeal from the July 2, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Randell was discharged on June 4, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on July 25, 2018. Mr. Randell participated. Raul Ybanez of Equifax represented the employer and presented testimony through Margarita Bernardino. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-07268-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

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 Randell was employed by Marsden Building Maintenance, L.L.C. as a full-time general cleaner from September 2016 until May 29, 2018, when the employer discharged him from the employment. Mr. Randall was assigned to clean at the Des Moines airport. Mr. Randall's usual work hours were 10:30 p.m. to 7:00 a.m., Tuesday evening through Sunday morning. However, during the last month of the employment, the employer had Mr. Randall working on a special project and adjusted his work hours to 6:30 p.m. to 2:00 a.m. Vince Scavo, Building Supervisor, was Mr. Randell's primary supervisor. Shift Leads Tith Hem and Eddie Carr also assisted in supervising Mr. Randall's work. Under the employer's written policy, Mr. Randell received a 30-minute lunch break midway through his shift. In practice, the cleaners assigned to the Des Moines airport took additional breaks. On March 23, 2018, Mr. Randell took an unauthorized 10-minute cigarette break from 10:30 p.m. to 10:40 p.m., at a time when he was supposed to be cleaning floors. Mr. Randell had received his 30-minute lunch break about an hour earlier. Mr. Hem, known as "T," observed Mr. Randell return from the cigarette break. Mr. Hem or another employee believed that Mr. Randell had been shampooing carpets as assigned. Mr. Randell had cleaned the carpet area they checked a couple hours before they

checked the carpet and found it to be dry. In response to the unauthorized cigarette break, Mr. Scavo suspended Mr. Randell from the employment and directed him not to return to work until after he had spoken with Margarita Bernadine, Human Resources Business Partner. Mr. Randall spoke with Ms. Bernardino on May 28, 2018. Ms. Bernardino asked Mr. Randell about the unauthorized cigarette break and Mr. Randell admitted he had taken a 10-minute cigarette break during his shift. Ms. Bernardino did not ask about the carpet cleaning issue. The employer discharged Mr. Randell the same day.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The evidence in the record establishes a discharge for no disqualifying reason. The evidence establishes a suspension and discharge based on an unauthorized 10-minute break that occurred on May 23, 2018. The employer presented insufficient evidence to prove any additional violations of the break policy and any other work rule violation. The employer presented insufficient evidence to prove that Mr. Randell failed to clean carpets on May 23, 2018. The break policy violation does not rise to the level of misconduct in connection with the employment that would disqualify Mr. Randell for unemployment insurance benefits. Because the evidence in the record establishes a discharge for no disqualifying reason, Mr. Randell is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged.

DECISION:

The July 2, 2018, reference 01, decision is reversed. The claimant was suspended and 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/rvs