

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MITCHEL J MILLER

Claimant

APPEAL NO. 09A-UI-05027-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SOUTHEAST POLK
COMMUNITY SCHOOL DISTRICT**

Employer

**Original Claim: 03/01/09
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.26(21) – Quit in Lieu of Discharge
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 24, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 27, 2009. Claimant Mitchel Miller did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Steve Oberto, Director of Classified Personnel, represented the employer.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether the claimant's discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mitchel Miller was employed by the Southeast Polk Community School District as a full-time custodian from 2005 until March 2, 2009, when Kerry Haynes, Director of Buildings and Grounds, discharged him from the employment.

The final incident that prompted the discharge occurred on February 19, 2009. On that day, Mr. Miller purchased cigarettes for a high school student. Mr. Miller made the purchase during his work day and placed the cigarettes in a trash receptacle for the student to retrieve. The student retrieved the cigarettes. The student's friend reported the conduct to the school administration. The Vice Principal summoned the student's mother to the school. The student's mother located the cigarettes in the student's undergarment.

On February 19 or 20, Mr. Haynes and the School Resource Officer, a Polk County Deputy, interviewed Mr. Miller about the conduct. While Mr. Haynes was present, Mr. Miller denied

responsibility. After Mr. Haynes departed from the discussion, Mr. Miller admitted to the resource officer that he had in fact provided cigarettes to the minor student, but had told Mr. Haynes otherwise in an attempt to preserve his job. Mr. Haynes placed Mr. Miller on administrative leave. Mr. Haynes did not notify Mr. Miller prior to March 2, 2009, that the February 19, 2009 conduct subjected him to possible discharge from the employment. While Mr. Miller was on administrative leave, the employer consulted with legal counsel, but was not engaged in any further investigation.

On March 2, the employer summoned Mr. Miller to a meeting. Mr. Haynes and Steve Oberto, Director of Classified Personnel, participated in the meeting, as did a union representative. The employer notified Mr. Miller that it could not allow him to continue as an employee. The union representative asked whether Mr. Miller could resign in lieu of being discharged. The employer acquiesced in this request. The employer would not have allowed Mr. Miller to continue in the employment had he not resigned.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 administrative law judge notes that the employer by and large failed to present testimony from persons with firsthand knowledge of the events leading to Mr. Miller's separation from the employment. The exception was Mr. Oberto's testimony about the discharge meeting. The

claimant has failed to present any evidence to rebut the evidence presented by the employer. The weight of the available evidence indicates that Mr. Miller violated the law and acted with wanton disregard of the employer's interests on February 19, 2009, when he purchased cigarettes for a minor. But, the evidence fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). The evidence indicates that the conduct came to the employer's attention on February 19, that the employer placed Mr. Miller on administrative leave on February 20, but that the employer did not notify Mr. Miller that the conduct placed his job in jeopardy until March 2, at which time the employer discharged Mr. Miller from the employment. This delay between the date the conduct came to the employer's attention and the date the employer notified Mr. Miller that he faced possible discharge because of the conduct was unreasonable and caused the conduct in question to no longer constitute a "current act" for purposes of determining Mr. Miller's eligibility for unemployment insurance benefits. Because there was no "current act," there was no basis for disqualifying Mr. Miller for unemployment insurance benefits.

DECISION:

The Agency representative's decision dated March 24, 2009, reference 01, is affirmed, but modified as follows. The claimant quit in lieu of discharge. The separation was involuntary. The forced resignation was not based on a current act. The separation did not disqualify the claimant for benefits. The claimant is eligible, provided he meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw