

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

WALTER I KENISON
Claimant

APPEAL NO. 19A-UI-03360-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAL SILVERCREST CORP
Employer

OC: 03/17/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Walter Kenison filed a timely appeal from the April 10, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Kenison was discharged on March 20, 2019, for failure to perform satisfactory work despite being capable of performing satisfactory work. After due notice was issued, a hearing was commenced on May 10, 2019 and concluded on May 14, 2019. Mr. Kenison participated. Staci Fjelland represented the employer and presented additional testimony through Jasna Beganovic. Exhibits 1 through 17, 19, 20 and A through E 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: Walter Kenison was employed by Dial Silvercrest Corporation, doing business as Woodland Creek Retirement Community, as the full-time Executive Chef from 2016 until March 20, 2019, when the employer discharged him from the employment due to an ongoing pattern of negligence, insubordination, and rude demeanor directed at staff and residents. Mr. Kenison supervised 15 to 20 employees, including a sous chef, cooks, dining room servers, and a dishwasher. In May 2018, Staci Fjelland, transitioned from Marketing Director to Executive Director and became Mr. Kenison's immediate supervisor.

The final incident that triggered the discharge came to the employer's attention within a week before the discharge, when a recently hired cook gave notice that she would be leaving the employment and reference a stressful work environment and inadequate training as factors in her decision to leave the employment. Earlier in March, a nursing home resident had given notice of her intent to move from the facility based on rude treatment she had received when interacting with Mr. Kenison. Upon receipt of the departing cook's concern, Ms. Fjelland reviewed Mr. Kenison's progress, or lack of the same, in meeting the terms of a performance improvement plan Ms. Fjelland had implemented on January 4, 2019.

In December 2018, Ms. Fjelland began to more closely track Mr. Kenison's work performance in response to multiple concerns. At that time, one of the recent concerns was Mr. Kenison's decision to take six consecutive days off without notifying Ms. Fjelland. Most of the concerns referenced in the performance improvement plan and continued unresolved thereafter. Mr. Kenison had failed to establish and enforce daily cleaning and deep cleaning schedules. Multiple employees had requested to transfer away from working under Mr. Kenison due to his demeanor. Mr. Kenison failed to follow up with applicants in a timely and effective manner. Mr. Kenison failed to establish and adhere to a monthly staff meeting schedule. Mr. Kenison failed to provide employee evaluations in a timely manner. Mr. Kenison failed to effectively monitor, facilitate, and enforce employees' completion of computer-based training requirements. Mr. Kenison failed to respond to employer emails. Mr. Kenison had adequate time and resources to address the issues in timely and appropriate manner, but failed to do so. However, Mr. Kenison routinely found time for unauthorized smoke breaks away from the facility.

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).

The evidence in the record establishes a discharge for misconduct in connection with the employment. The weight of the evidence establishes an ongoing, unreasonable failure to comply in a timely an appropriate manner to the employer's reasonable directives. The weight of the evidence supports the employer's assertion that there were ongoing demeanor issues that negatively impacted residents and staff. The weight of the evidence establishes an ongoing neglect of duties. The pattern of conduct indicated an intentional and substantial disregard of the employer's interests. Mr. Kenison is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Kenison must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The April 10, 2019, reference 01, decision is affirmed. The claimant was discharged on March 20, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs