

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES A MIDDLESWART
Claimant

APPEAL NO. 13A-UI-10016-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QPS EMPLOYMENT GROUP INC
Employer

OC: 07/14/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

James Middleswart filed a timely appeal from the August 23, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 10, 2013. Mr. Middleswart participated. Rhonda Hefter de Santisteban represented the employer and presented additional testimony through Kaila Bloomberg. The hearing in this matter was consolidated with the hearing in Appeal Number 13A-UI-10017-JTT. Exhibits One through Seven were received into evidence. The administrative law judge took official notice of the agency's administrative record (DBRO) of benefits paid 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: QPS Employment Group, Inc., is a temporary employment agency. In February 2013, QPS placed James Middleswart in a full-time, temp-to-hire work assignment at Cretex Concrete. On May 12, 2013, Mr. Middleswart was injured while working in the assignment, when a piece of steel pipe injured his left hand. Mr. Middleswart is right-handed. The injury to the left hand required surgery. On May 28, 2013, Mr. Middleswart was released to return to light-duty work that did not involve use of his left hand. The employer placed Mr. Middleswart in a temporary work assignment at Goodwill Industries.

The employer discharged Mr. Middleswart from the assignment at Goodwill Industries, and from the employment with QPS, after the employer discovered that Mr. Middleswart had signed out of the assignment four times to go to scheduled physical therapy appointments without actually going to the appointments. The dates of the missed physical therapy appointments were July 2, 3, 9 and 11, 2013. The employer had agreed to pay Mr. Middleswart for the time he spent participating in the physical therapy sessions and Mr. Middleswart had submitted time sheets for payment for his work time, including the time spent at the physical therapy sessions. The fact that Mr. Middleswart was skipping physical therapy sessions but seeking payment for

the time came to the employer's attention on July 17, 2013. On July 16, Mr. Middleswart had walked out of a follow up medical appointment pertaining to his left hand. This prompted Branch Manager Kaila Bloomberg to direct Mr. Middleswart to obtain a statement of his physical therapy visits from the physical therapy provider. The appointment history indicated that Mr. Middleswart had not been going to scheduled physical therapy appointments since he last attended one on June 27, 2013.

While Mr. Middleswart was in the light-duty assignment at Goodwill in connection with his workplace injury to his left hand, Mr. Middleswart fractured his right arm in a non-work-related incident. Ms. Bloomberg notified Mr. Middleswart that once he was released to return to work in connection with his left hand being healed, the employer would not be able to accommodate the non-work-related injury to his right arm. However, at the time of discharge Mr. Middleswart had not been released to return to full duty in connection with his left hand injury.

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 Mr. Middleswart was intentionally dishonest with the employer when he submitted timesheets for payment that included time for scheduled physical therapy appointments that he did not attend. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Middleswart was discharged for misconduct. Accordingly, Mr. Middleswart 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.

DECISION:

The agency representative's August 23, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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