

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DILLON M FUTRELL**  
Claimant

**BARTELS LUTHERAN HOME INC**  
Employer

**APPEAL 17O-UI-12025-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/03/17**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 18, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for conduct not in the best interest of his employer. The parties were properly notified of the hearing. A telephone hearing was held on October 13, 2017. The claimant, Dillon M. Futrell, participated. The employer, Bartels Lutheran Home, Inc., participated through Veronica Shea, HR Generalist. Employer's Exhibits 1 through 5 were received and admitted into the record without objection. The administrative law judge issued a decision that claimant failed to file his appeal in a timely manner. Claimant appealed that decision, and the Employment Appeal Board reversed the administrative law judge's decision on timeliness. See 17B-UI-09960 (mailed Nov. 21, 2017). The Employment Appeal Board also remanded this matter for a decision on the merits and instructed the administrative law judge to conduct an additional hearing solely if she deemed it necessary to develop issues that were not adequately addressed in the first hearing. The administrative law judge believes an additional hearing is not necessary, and this decision is being issued based on the record as it developed during the hearing on October 13, 2017.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a dietary aide, from May 11, 2016, until August 29, 2017, when he was discharged from employment for misusing his work time. The employer does not know when the final incident occurred that led to claimant's discharge. Claimant was routinely found away from his work area, and he occasionally disappeared to retrieve an item and returned without the item. On one occasion, claimant was found in the stairwell on his cell phone. Claimant claims he was merely checking the time. Claimant had been given verbal warnings about this behavior. It is unclear from the record whether he was aware his job was in jeopardy for this specific conduct.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. \_\_-\_\_, (Iowa Ct. App. filed \_\_, 1986).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. Shea described a problematic pattern of behavior that may amount to misconduct. However, the employer bears the burden to establish that the act for which a claimant was discharged was a current act of misconduct. Shea could not identify a final incident of misconduct. She did not know the dates of any prior instances either, nor did she know the dates of any prior warnings. The employer has not met its burden to establish that claimant was discharged for a current act of misconduct. Benefits are allowed, provided claimant is otherwise eligible.

**DECISION:**

The September 18, 2017 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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