

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT MCMULLIN

Claimant

APPEAL NO. 16A-UI-10839-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 09/11/16

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Scott McMullin filed a timely appeal from the September 29, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. McMullin was discharged on September 2, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on October 19, 2016. Mr. McMullin participated personally and was represented by his mother, Barbara Lewczak. Mr. McMullin and Matthew Reece testified on Mr. McMullin's behalf. Kelly Kirkman represented the employer and presented additional testimony through Jeffrey Brickner. Exhibits 1 through 4 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: Scott McMullin was employed by Casey's Marketing Company as a full-time pizza maker at the Casey's store in Dallas Center from June 2015 until September 2, 2016, when Store Manager Kelly Kirkman discharged him for consuming alcohol on the job. The employer's written drug and alcohol policy prohibited Mr. McMullin from consuming alcohol on the job. Mr. McMullin signed his acknowledgement of the policy at the start of the employment. Prior to September 1, day cook Jeffrey Brickner and other store employees had expressed concern to Ms. Kirkman that Mr. McMullin was drinking beer at work. The questionable conduct took place at a time when Ms. Kirkwood was not present at the store. On August 31, Mr. Brickner confronted Mr. McMullin as Mr. McMullin exited the beer cooler with a can of beer concealed in his pocket. Mr. McMullin asserted at the time that he just had his wallet and his phone in his pocket, but refused Mr. Brickner's request that he disclose the contents of this pocket. Ms. Kirkman told Mr. Brickner that she needed documentation of the alcohol consumption, such as a video recording, before she could take disciplinary action.

On September 1, 2016, Mr. Brickner, used his cell phone to surreptitiously record Mr. McMullin drinking a 16 ounce can of Busch Lite beer. At the time Mr. McMullin consumed the beer, he was sitting in his personal vehicle in the employer's parking lot and was on a purported smoke break. The cell phone recording documented the time of the conduct as 6:50 p.m. on September 1, 2016. Mr. McMullin was on the schedule from 3:00 p.m. to 11:00 p.m. that day, but left at 8:00 p.m., after Mr. Brickner and one other employee confronted him about drinking on the job.

The next morning, Mr. Brickner shared the video recording with Ms. Kirkman. Mr. McMullin had attempted to disguise the beer can by placing it in a foam can cooler or "Koosie." However, the 16 ounce can of beer extended a couple inches above the top of the can cooler. Ms. Kirkman readily recognized the beverage as a 16 ounce can of Busch Lite, a product the Casey's store sells and a product that Ms. Kirkman dealt with daily. The employer also sells 16 ounce cans of Pepsi, but the two products are readily distinguishable. The Pepsi can is dark blue, while the Busch Lite can is light blue and gray. Ms. Kirkman notified Mr. McMullin on the morning of September 2 that his services were no longer needed, based on his consumption of alcohol at work.

REASONING AND CONCLUSIONS OF LAW:

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).

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 weight of the evidence in the record establishes that Mr. McMullin did indeed consume alcohol on September 1, 2016 while on the clock and in violation of the employer's alcohol policy. The evidence also strongly suggests that Mr. McMullin had been stealing beer from the employer. Each act demonstrated a willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. Mr. McMullin is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. McMullin must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The September 29, 2016, reference 01, decision is affirmed. The claimant was discharged on September 2, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs