

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JEFF D SIMONS
PO BOX 562
DUBUQUE IA 52004-0562

CITY OF DUBUQUE
C/O PERSONNEL DEPT
50 W 13TH ST
DUBUQUE IA 52001-4864

Appeal Number: 04A-UI-00618-DWT
OC 12/14/03 R 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal are based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge or Suspension

STATEMENT OF THE CASE:

City of Dubuque (employer) appealed a representative's January 13, 2004 decision (reference 01) that concluded Jeff D. Simons (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 24, 2004. The claimant participated in the hearing. Bob Green, Randy Peck, the personnel manager, and Mike Brekke, the claimant's supervisor, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge or suspend the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked as a full-time driver in the water department. Brekke is his supervisor. Prior to November 13, 2003, the employer had never given the claimant a written or verbal warning.

On November 13, 2003, a female contacted Green and complained how the claimant physically assaulted her at her residence on October 20 at noon. The female called the employer before she contacted the police. The female told Green she had not previously reported the October 20 incident because she was afraid of the claimant. When the female called, the employer did not know the claimant had filed a complaint with the police department against her for harassing him in October. The employer also did not know the claimant had told the female the night before he no longer wanted anything to do with her. The claimant and the female had been dating. The employer also did not know the female called the claimant many times the evening of November 11 through 6:00 a.m. on November 12, and had threatened the claimant by telling him she would get him discharged.

The employer talked to the claimant about the complaint on November 13, 2003. The claimant denied he ever physically assaulted the complaining female and could not remember where he was at on October 20, 2003. The employer knew the claimant helped Ken Massey do some flow tests on the other side of town at 11:50 on October 20. The employer also knew the claimant's timecard indicated he worked through his lunch and received 45 minutes of overtime on October 20.

When the female complained, she told the employer she had made a 911 call to the employer on October 20, 2003. The employer's records verified that a 911 call had been made from the female's residence around 12:30 p.m. on October 20. When the dispatcher answered the call, the caller had already hung up. The dispatcher called back to see if everything was all right and a man answered the phone. After listening to the tape recording of the call, the employer concluded the claimant was the man who answered the phone. The employer also concluded the claimant falsified his time card because he did not deduct the time he had been at the female's home for personal reasons. The claimant actually rented the residence the female lived at with her children and moved out when the relationship deteriorated. The claimant and the female were still dating or seeing each other on October 20.

On December 15, the employer decided to discharge the claimant because the claimant falsified his October 20 time card and was not honest with the employer concerning his whereabouts on October 20. The claimant grieved his termination to the Civil Service Board. On January 23, 2003, the Civil Service Board reinstated the claimant but did not pay him any back wages.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges or suspends him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at

issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a suspension or discharge for misconduct cannot be based on such past act or acts. A termination of employment or suspension must be based on a current act. 871 IAC 24.32(8).

Based on the employer's conclusion, the employer had business reasons for discharging or suspending the claimant. The evidence does not, however, establish that the claimant was not truthful as to where he was on October 20 or that he falsified his October 20 time card. Since the complaining witness waited until November 13 to make any complaint and talked to the employer before filing a police report, her credibility and motive is highly suspect. Even though the employer knew the claimant worked with Ken Massey at 11:50 a.m., the employer did not ask Massey how long the two of them worked after 11:50 p.m. Given the period of time between October 20 and November 13, Massey may not have remembered, just like the claimant could not remember where he had been on October 20 when the employer asked him on November 13. Based on the problems the claimant had with the complaining female and his problem-free work performance prior to November 13, the claimant's testimony is credible.

The credible facts in this case do not establish that the claimant committed work-connected misconduct. Additionally, the employer knew over a month about the October 20 incident before discharging or suspending the claimant. For unemployment insurance purposes, the employer did not discharge or suspend the claimant based on a current act. As a result, the claimant cannot be disqualified from receiving benefits. As of December 14, 2003, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's January 13, 2004 decision (reference 01) is affirmed. The employer ultimately suspended the claimant for reasons that do not constitute work-connected misconduct. As of December 14, 2003, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/kjf