

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSEPHINE C WESTON**  
Claimant

**APPEAL NO. 12A-UI-11641-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CITY OF ADAIR**  
Employer

**OC: 09/02/12**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 24, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 24, 2012. Ms. Weston participated. Attorney Beverly Wild represented the employer and presented testimony through Dennis Weigel, Michelle King, Craig Wedemeyer and Larry Ludwig. Exhibits 1 through 38 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: Josephine Weston was employed by the City of Adair as a Deputy City Clerk and as a Police Officer. Ms. Weston started her employment in 2007 and last performed work for the employer on September 5, 2012. Ms. Weston's supervisor in the Police Department was Robert Koeneman, Police Chief. Ms. Weston's supervisor in the City Clerk's office was Michelle King, City Clerk. The City Council discharged Ms. Weston from the employment during a Council meeting on September 5, 2012.

The City Council considered several matters in making the decision to discharge Ms. Weston from the employment.

In June 2011, Ms. Weston invoked the City's tax-exempt status to purchase, for personal use, a police vehicle from a Des Moines dealer without paying the applicable sales tax and/or registration fee.

In November 2011, Ms. Weston used the City's tax exempt status to purchase four new tires for her personal vehicle. In addition, Ms. Weston had the tires billed to the City. Ms. Weston took no steps to reimburse the City until months later when the auto center contacted the City about the delinquent bill.

Ms. Weston failed, over an extended period, to maintain various certifications, and failed to timely complete in-service hours, both of which were required for her position as a police officer. These included firearms certification, CPR certification, taser certification for the taser Ms. Weston wore on her person. Ms. Weston misrepresented at an August 8, 2012 City Council meeting that her certifications were current, when she knew they were not. Ms. Weston had used the Police Department's account in March 2012 to order the taser she was not certified to carry.

Ms. Weston failed, over an extended period, to work in good faith with the City Clerk, to develop and adhere to a schedule that would equitably divide her time between the Police Department and the Clerk's office as directed by the Mayor.

Ms. Weston and the Police Chief had a personality conflict with the City Clerk. Ms. Weston would use her work time in the clerk's office to gossip with the Police Chief about the Clerk. This interfered with Ms. Weston getting her Deputy Clerk duties done. Ms. Weston attempted to intimidate the City Clerk after the August 8, 2012 Council meeting, when Ms. Weston approached the Clerk in an aggressive manner while armed.

At an August 8, 2012 City Council meeting, Ms. Weston and the Police Chief intentionally intimidated a concerned citizen who appeared before the City Council to report on the City's annual Jesse James Days festival. After the concerned citizen spoke about the lack of law enforcement at the festival and the several disputes during the festival that needed law enforcement involvement, Ms. Weston followed the citizen out the door to take further issue with her statements to the Council.

Toward the end of the employment, when Ms. Weston became aware that Ms. King had been assigned to investigate the various concerns the Mayor and City Council had about Ms. Weston's conduct, Ms. Weston contacted a City Councilman and insisted that the City Councilman stop Ms. King's investigation. Ms. King completed her investigation on August 29, 2012 and reported her findings to the City Council. Ms. Weston's discharge followed seven days later.

#### **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 weight of the evidence in the record establishes a pattern of conduct on the part of Ms. Weston that demonstrated a willful and wanton disregard for the interests of the City of Adair. Ms. Weston carried weapons without the appropriate certification. Ms. Weston let her law enforcement officer in-service hours lapse and her certifications expire, though she knew these were required to comply with the City's work rules and Iowa law enforcement standards. Ms. Weston resorted to intimidation and other subterfuge to prevent the City Council from holding her accountable for her actions. Ms. Weston defrauded the state of registration fees/sales tax through a vehicle purchase related and used her position as an Adair Police Officer to do so. Ms. Weston went even further when she made a personal purchase of tires, had the bill sent to the City and again defrauded the state of applicable taxes.

The evidence establishes a current act for unemployment purposes insofar as the City Council was not fully aware of the extent of the misconduct until the end of August 2012, when Ms. King completed her investigation.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Weston was discharged for misconduct. Accordingly, Ms. Weston is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Weston.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

**DECISION:**

The Agency representative's September 24, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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