

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JAMES P MORGAN
Claimant

APPEAL NO. 18A-UI-09045-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAKER'S PRIDE INC
Employer

OC: 08/05/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 21, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on May 21, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 17, 2018. Claimant James Morgan participated. Sandra Gonzales of Insperity PEO Services represented the employer and presented additional testimony through Richard Young and Steve Armstrong. Exhibits 1 through 8 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: James "JP" Morgan was employed by Baker's Pride, Inc. as a full-time maintenance worker from January 2018 until May 21, 2018, when Rick Young, Vice President of Operations, discharged him from the employment for reporting to work under the influence of alcohol at work on May 18, 2018. Prior to reporting for work at 6:00 p.m. on May 18, Mr. Morgan stopped at a local tavern and consumed beer. While Mr. Morgan was at the tavern, another Baker's Pride employee, Steve Armstrong, was at the same tavern and heard Mr. Morgan get in a dispute when the bartender refused to serve Mr. Morgan another drink. Mr. Armstrong heard Mr. Morgan tell the bartender that one more would not hurt before he reported for work. When Mr. Morgan left the tavern, Mr. Armstrong confirmed Mr. Morgan's identity with the bartender. When Mr. Morgan reported for work, coworkers noted that Mr. Morgan was acting out of the ordinary. At least a couple suspected Mr. Morgan might be under the influence of alcohol. Neither of the foreman on duty requested that Mr. Morgan submit to drug or alcohol testing. Mr. Morgan was allowed

to complete his shift. On May 19, Phil Boyle, Sanitation Foreman, contacted Mr. Young to report that Mr. Morgan had been acting out of the ordinary on May 18. Mr. Boyle's subsequently written statement indicates that Mr. Boyle did not suspect Mr. Morgan to be under the influence of alcohol during the shift. Mr. Young directed Laurie Grey, Human Resources Manager, to commence an investigation and collect written statements from the employees who had observed Mr. Morgan at work on May 18. On May 21, Mr. Boyle provided the following statement:

Employee was acting a bit out of normal in regard to behavior talk etc. Employee was not slurring his words or staggering and could not detect alcohol on there [sic] breath. Had my questions that he might be under the influence of some kind.

On May 21, William Brockett, Sanitation Foreman, provided the following statement: "employee came in smelling like alcohol and was acting diffrent [sic] I asked if he was okay and he said yes." On May 21, Adrian Campbell provided the following statement: "Drinking before work." On May 21, Mr. Armstrong contacted Ms. Grey with his concern and conveyed his observations from the tavern encounter on May 18. Mr. Armstrong provided a typed written statement the following day.

On May 21, Mr. Young met with Mr. Morgan for the purpose of discharging him from the employment. At that time, Mr. Morgan told Mr. Young that he had a drinking problem and should not have come to work after drinking. Mr. Morgan requested another opportunity in the employment. Mr. Young proceeded with discharging Mr. Morgan from the employment.

The employer's written Standards of Conduct lists rules infractions that may result in disciplinary action up to and including termination of the employment. Amongst the list of such infractions is the following: "Possessing, distributing, selling, transferring, or using—or being under the influence of—alcohol or illegal drugs in the workplace."

The employer has a separate drug and alcohol policy that prohibits use, possession, or being under the influence of alcohol on the job. The policy indicates that, "Any employee who is found to be in possession of or under the influence of alcohol in violation of this policy will be subject to discipline up to and including termination." The employer's written policy referenced reasonable suspicion drug and alcohol testing. The policy did not provide a procedure by which such testing would occur and did not set forth a standard for alcohol concentration that would be deemed to violate the policy. The employer provided the policy to Mr. Morgan at the start of his employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The employer presented insufficient proof, and insufficiently direct and satisfactory evidence, to prove by a preponderance of the evidence that Mr. Morgan was under the influence of alcohol at work on May 18, 2018. The employer elected not to present testimony from the foremen or coworkers on duty with Mr. Morgan on May 18. Mr. Armstrong's contact with Mr. Morgan was from a distance and his conclusions were based largely on hearsay of questionable value, the statements of the unnamed bartender. Iowa Code section 750.5 authorizes private sector drug and alcohol testing and sets forth the parameters under which such testing may occur. The statute authorizes reasonable suspicion drug and alcohol testing and prescribes requirements

for the testing procedure, the written policy, and the qualifications of the person charged with implementing the policy. There are a number of problems with the employer's case. There is proof by a preponderance of the evidence that Mr. Morgan consumed alcohol prior to reporting for work on May 18, but the employer's policy did not prohibit coming to work after merely consuming alcohol. Instead the policy prohibited being "under the influence" of alcohol. The preponderance of the evidence fails to establish that Mr. Morgan was indeed "under the influence" of alcohol at work on May 18, 2018. Mr. Boyle's written statement specifically indicates that he did not perceive during his close contact with Mr. Morgan on May 18 that Mr. Morgan was under the influence of alcohol. A couple other employees provided cursory statements that indicated a reasonable suspicion for testing, but that did not prove that Mr. Morgan was "under the influence" of alcohol. The employer did not follow its own policy and did not subject Mr. Morgan to testing at the time the concern arose. Mr. Armstrong's statement again would have provided reasonable suspicion to justify testing on May 18, but is not proof that Mr. Morgan was indeed "under the influence" of alcohol on May 18, 2018. The employer's policy fails to meet a number of the requirements set for at Iowa Code Section 730.5, including the requirement that the policy set forth the procedure for alcohol testing and a statement of the concentration of blood alcohol that will be deemed a violation.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Morgan was discharged for no disqualifying reason. Accordingly, Mr. Morgan is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The August 21, 2018, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs