

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**AUTUMN M DANIEL**  
Claimant

**APPEAL NO. 18A-UI-03448-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SLB OF IOWA LC**  
Employer

**OC: 02/18/18**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Administrative Code rule 871-24.32(8) – Current Act Requirement  
Iowa Code Section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 7, 2018, reference 01, decision that allowed benefits to the claimant provided she 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 February 20, 2018 discharge was not based on a current act. After due notice was issued, a hearing was held on April 10, 2018. Claimant Autumn Daniel participated. Karen Beard represented the employer and presented additional testimony through Cynthia Kapela. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 3, 5, 6 and 7 into evidence.

**ISSUES:**

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

Whether the discharge was based on a current act.

Whether the claimant was overpaid benefits.

Whether the claimant must repay 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: Autumn Daniel was employed by SLB of Iowa, L.C., d/b/a Panera Bread, as a full-time Shift Supervisor until February 20, 2018, when the employer discharged her from the employment. Ms. Daniel began her employment in 2014. Ms. Daniel was assigned to the West Des Moines store. Rachel Snoldt, General Manager, was Ms. Daniel's immediate supervisor. Ms. Daniel worked varied hours. At the start of the employment, the employer provided Ms. Daniel with an

employee handbook. The employee handbook included a Substance and Alcohol Policy. The policy prohibited unlawful or unauthorized use or possession of controlled substances while on company premises or on company paid time.

The sole incident that factored in the discharge decision occurred on February 5, 2018. On that day, Ms. Daniel traveled with three coworkers to a company meeting in Coralville. Ms. Daniel drove her personal vehicle to and from the meeting. The employer compensated Ms. Daniel for her travel time and mileage, pursuant to standard operating procedures. When the meeting adjourned at 4:00 p.m., Ms. Daniel and her coworkers traveled back to the Des Moines in a snow storm. On the return trip to Des Moines, Ms. Daniel and one of her coworkers, Shift Supervisor Brittany Lynch, smoked marijuana. The other employee, Assistant Manager Allison Andrews, consumed alcohol.

On February 7, Ms. Daniel told Ms. Snoldt about the marijuana use and Ms. Andrews' alcohol consumption. On that same day, Ms. Lynch reported the conduct to Cynthia Kapela, District Manager. On February 8, Ms. Kapela reported the conduct to Karen Beard, Human Resources Manager. Ms. Beard directed Ms. Kapela to speak with Ms. Daniel and the other employees to confirm the conduct. On February 8, Ms. Daniel confirmed to Ms. Kapela that she and Ms. Lynch had been smoking marijuana and that Ms. Andrews had been consuming alcohol on the return trip to Des Moines. During February 8 contact, Ms. Kapela told Ms. Daniel that the conduct could result in discipline. Ms. Daniel asked whether the conduct would hinder her from being promoted. Ms. Kapela told Ms. Daniel that the incident would be a minor setback. Ms. Kapela omitted any reference to possible discharge from the employment. On that same day, Ms. Kapela reported back to Ms. Beard that she had confirmed the conduct. Ms. Beard told Ms. Kapela that she would consult with the company's legal counsel regarding further steps. On February 13, Ms. Beard sent an email message to Ms. Kapela and to Ms. Kapela's supervisor, John Catalano, in which she advised the plan was to discharge all three employees in connection with the February 5 conduct. Ms. Kapela was concerned about the impact discharging all three supervisors would have on operations at the Des Moines metropolitan stores, given that the stores were already short-staffed. Ms. Kapela sent an email message to Mike Young, Operations Partner, in which she expressed her concern. On February 16, 2018, Mr. Young decided to proceed with discharging all three employees. On February 19, 2018, the employer discharged Ms. Lynch and Ms. Andrews. On February 20, 2018, Ms. Kapela notified Ms. Daniel that she was discharged from the employment. During the period of February 5-20, 2018, Ms. Daniel had continued to report for work as usual and had had three days off, including February 19, 2018. Prior to February 20, the employer had not notified Ms. Daniel that she faced possible discharge from the employment in connection with the February 5 conduct.

Ms. Daniel established a claim for benefits that was deemed effective February 18, 2018. Ms. Daniel received \$1,510.00 in benefits for the five-week period of March 4, 2018 through April 7, 2018.

On March 5, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Daniel's separation from the employer. Karen Beard represented the employer at the fact-finding interview.

#### **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. 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). 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).

Violation of a specific work rule, even off-duty, can constitute misconduct in connection with the employment. In *Kleidosty v. EAB*, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The unemployment insurance claimant, Mr. Kleidosty, was convicted of selling cocaine off the employer's premises. The Iowa Supreme Court found Mr. Kleidosty's misconduct to be work-related. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

Ms. Daniel's possession and use of marijuana during the February 5, 2018 return trip to Des Moines was conduct in connection with the employment. The weight of the evidence establishes that Ms. Daniel was on-duty at the time. She had just left an employee meeting in Coralville and was being paid her normal wage to transport herself and two coworkers back to Des Moines. In addition, she was compensated for her mileage expense. Ms. Daniel's possession and use of marijuana was an indictable criminal offense, punishable by up to six months in jail and a \$1,000.00 fine. See Iowa Code section 124.401(5). In addition, Ms. Daniel knew the conduct violated the employer's Substance and Alcohol Policy.

The weight of the evidence in the record establishes a discharge based on a current act. 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. *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988). In an unpublished opinion, the Iowa Court of Appeals held that a delay of 10 business days between the employer's knowledge of the rule violation and the discharge was a reasonable amount of time when the employer conducted a second investigatory interview and the human resources department then assessed the situation. *Milligan v. EAB*, 802.N.W. 238 (Table) (Iowa App. 2011). While the unpublished decision does not constitute binding legal precedent, it does provide useful guidance. In the present case, there was a 10-work-day delay between the employer's knowledge of the violation and the discharge date. During that time, the employer's management staff reasonably and appropriately deliberated the business impact of discharging Ms. Daniel from the employment. The employer did not unreasonably delay the discharge decision or the discharge event. In addition, the employer did not hold this matter in reserve and wait for some other issue to arise in the employment prior to the discharging Ms. Daniel from the employment.

Because the evidence in the record establishes a discharge that was based on a current act of misconduct in connection with the employment, Ms. Daniel is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Daniel must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that

awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Daniel received benefits, but has been disqualified for those benefits as a result of this decision. Accordingly, the \$1,510.00 in benefits that Ms. Daniel received for the five-week period of March 4, 2018 through April 7, 2018 constitutes an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Daniel is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid.

**DECISION:**

The March 7, 2018, reference 01, decision is reversed. The claimant was discharged on February 20, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$1,510.00 in benefits for the five-week period of March 4, 2018 through April 7, 2018. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/rvs