

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVID R LONDON**  
Claimant

**APPEAL NO. 12A-UI-08020-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA DEPT OF CORRECTIONS  
IOWA PRISON INDUSTRIES**  
Employer

**OC: 06/03/12**  
**Claimant: Respondent (2-R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.26(21) – Quit in Lieu of Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 26, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on July 26, 2012 and completed on July 27, 2012. Claimant David London participated. Kenneth Kjer of Employers Edge represented the employer and presented testimony through Al Reiter, Associate Warden at the Anamosa State Penitentiary. Exhibit One was received 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.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: David London was employed by the Iowa Department of Corrections until June 1, 2012, when he resigned in lieu of being discharged from the employment. Until April 26, 2012, Mr. London had been a supervisor with Iowa Prison Industries at the Rockwell City Prison Facility. Mr. London's duties included tracking tools and disbursing equipment and tools to state employees and offenders authorized to use them.

On March 1, 2012, the Director of Iowa Prison Industries gave notice to Mr. London that he would be laid off from his position at the end of business on April 25, 2012. At the same time, the Director notified Mr. London that he was eligible for the employer's Outplacement Program. On April 5, 2012, the Director approved Mr. London's request to extend his tenure in his then current position by one day with the understanding that Mr. London would be staying with the Department of Corrections in another position and the extra day would allow him to avoid a break in service to the agency. Mr. London last performed work in his Prison Industries supervisory position on April 25, took a day of leave without pay on April 26, and on April 27,

2012, started in his new position as a Senior Correctional Officer at the Fort Dodge Correctional Facility. That same day, the employer placed Mr. London on administrative leave with pay.

On April 19, 2012, while still in the Prison Industries supervisor position, Mr. London had used the Prison Industries account at Menards to purchase tools for the agency. At the same time and as part of the same transaction, Mr. London had purchased additional tools for his own personal use. The items purchased for personal use included a right angle impact driver (\$74.99) and a specialized pry bar (\$29.97). Mr. London also used the employer's account to purchase an extended warranty for the impact driver (\$7.98), though Prison Industries had never before purchased such plans for tools. After the trip to Menards that day, Mr. London took the items that Prison Industries staff had requested into the facility, but left the impact driver and the pry bar in the truck of his car. In the course of processing the associated paperwork, the employer was soon alerted to the suspected misuse of its Menards account. Mr. London used the right angle impact driver as part of a personal demolition project on at least April 26.

On April 27, 2012, the employer summoned Mr. London from his new workplace to a meeting at which the employer planned to interview Mr. London about the tools that had been purchased with the employer's account but that had not made it into the employer's tool inventory. On his way to the meeting, Mr. London learned what the interview was about. Mr. London doubled back to Fort Dodge, stopped at Menards and purchased a new right angle impact driver, which he placed in his trunk. Mr. London's delayed arrival for the interview was not lost on the employer.

Al Reiter, Associate Warden at the Anamosa State Penitentiary, conducted the interview. Mr. Reiter's duties included supervising the Prison Industries shops at Rockwell City. During the 15-minute interview, Mr. London admitted purchasing all of items at Menards, but asserted all has been purchased for use at the Rockwell City Prison Facility and that all had been requested by Prison Industries staff. During the interview, Mr. London asserted that he had erroneously left the right angle impact driver and the pry bar in his car for the previous eight days without transporting them into the Rockwell City Prison Facility and without alerting anyone to the fact that the tools were in his car. When asked whether he had used the tools for personal use, Mr. London told the employer he had not. While Mr. London had not used the new right angle impact driver he had just purchased, he did not share with the employer that he had in fact used the right angle impact driver he had purchased with the employer's account on April 19. Mr. London intentionally omitted that information in an attempt to mislead the employer.

Toward the end of the interview, Mr. Reiter notified Mr. London that he was being placed on paid administrative leave and that he needed to be available by phone at all times. The employer also provided Mr. London with written notice of his placement on paid administrative leave. Mr. London requested to make an additional statement, as follows: "Ok, I had no intention for my personal use, excuse me, with everything that has been going on with the layoff and with my house fire and the way I have been moving stuff in and out of my vehicles, it was an honest mistake and I was not stealing these tools." Mr. London then asked how the investigation and administrative leave would impact his new position, to which Mr. Reiter responded as follows:

Yes. We have talked to Warden McKinney about this, um, how this will affect your job, I don't have an answer for you at this time. I think our goal is to do a complete, thorough and accurate investigation and based on the results of that, a what has to be done, if anything. So, until then, I can't give you, until we have completed the investigation, but

a, you know we are going to follow the elements of just cause and go it very clearly and thoroughly. That is all I can tell you now.

The employer had Mr. London write a statement, which Mr. London did that day. Mr. London's written statement included the following: "I accidentally left the bag with the drill/driver and the prybar in the trunk of my car and did not take them to the shop. These items were covered from items that we moved out of our house." Mr. London had recently experienced a house fire and had moved some of his belongings out of the house. Mr. London included in his written statements the steps he had taken from the time he was instructed to appear for the meeting that morning to the time he appeared for the meeting. Mr. London intentionally omitted any reference to doubling back to the Fort Dodge Menards to purchase a new right angle impact driver. Mr. London closed his written statement with the following: "I had no intentions of taking any tools from IPI with everything that is going on it was a simple mistake."

After the employer interviewed Mr. London on April 27, the employer conducted further investigation into the matter. Mr. Reiter spoke with Ruthie Moser, Purchasing Agent. Mr. Reiter spoke to the remaining Prison Industries staff at the Rockwell City facility: Craig Hilpibre and Doyle Austin. The employer followed up with Menards.

On May 7, Mr. Reiter met with Mr. London again to further interview him about the matter. Mr. London confirmed that he had gone through the usual steps to process paperwork in connection with the April 19 Menards purchase. A short time into the interview, the union steward who had been assisting Mr. London with the interview asked for a break. When the meeting reconvened, Mr. London provided the following statement:

A when we conducted the first interview I gave you some false information, I was not 100 % honest with you. A That, the drill in question, when I picked the drill up, a, I did forget it in my car and when I was at my house on Thursday, the day I was off with no pay when I was between IPI and Ft Dodge employment 4/26/12 I was doing demo on my house, I was using my personal, my cordless drills and the batteries went dead, I had no electricity in my house and had no way of recharging them, I knew this drill was in my car, I took it, I used it, and removed some stuff from my wall and put it back in the package. When I was notified to come over here (Ft Dodge) Friday morning and Craig informed me of what it was when I called him, I did not want to turn, give back IPI a used drill, I went to Menards and purchased a replacement drill to replace that, that one that I previously purchased. So it was not a used drill that I was giving back to IPI.

When the employer questioned Mr. Reiter regarding why he had purchased a warranty for the impact driver, Mr. London stated that he knew how the staff went through drills in the shop, so he got a two year warranty on the driver. Mr. London confirmed that he had never before purchased a warranty for a Prison Industries tool. When the employer pressed Mr. London on his assertion that all of the items had been purchased at the request of Prison Industries staff, but that none had apparently requested the right angle driver or prybar sitting in Mr. London's care for eight days, Mr. London provided the following response:

You know if somebody had said that we wouldn't even be sitting here today. You know with the house fire, my layoff job, Al knows that I have been diagnosed with PTSD, I got a lot of crap going on in my life right now. You know, excuse me if I sound a little frustrated right now, I am. I have a lot of crap going on, you know, I had no intention of defrauding IPI of any tools.

Toward the end of the interview all parties present go into a discussion about Mr. London's job being in jeopardy. Mr. London asserted that he would not place his job in jeopardy over and \$80.00 drill, but acknowledged that he had indeed placed his job in jeopardy by virtue of the admissions he had made up to that point.

After the May 7 interview, Mr. Reiter prepared transcripts of both interviews. Mr. Reiter prepared a discipline packet that set forth the various work rules Mr. London had violated. Mr. Reiter followed up on statements Mr. London had made about the tool warranty and learned that Mr. Reiter had not registered the tool. Mr. Reiter forwarded the information and materials he had gathered to Jim McKinney, Warden of the Fort Dodge Correctional Facility. Mr. McKinney forwarded the material to Des Moines for further review by the Department of Corrections Administration and the Department of Administrative Services.

On May 22, the parties met for a Loudermill hearing, at which time the employer formally notified Mr. London of its plan to discharge him from his employment and gave Mr. London on opportunity to present additional information. The Loudermill hearing did not alter the employer's plan to discharge Mr. London from the employment. The employer subsequently gave Mr. London the opportune to resign in lieu of being discharged from the employment. On June 1, Mr. London submitted his written resignation.

#### **REASONING AND CONCLUSIONS OF LAW:**

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). In Hurtado, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The weight of the evidence in the hearing establishes that on April 19, 2012, Mr. London used the employer's Menards account to purchase tools for his personal use. Mr. London intentionally left those tools in his car for eight days. Mr. London used the right angle impact driver on a personal project. Mr. London attempted to intentionally mislead the employer by purchasing a replacement impact driver while enroute to be interviewed about the tool purchase. During the April 27 interview Mr. London did in fact provide false information to the employer in an attempt to mislead the employer as the employer conducted its investigation. Ms. London's intentional dishonesty in connection with the April 27 interview came to light during the latter portion of the May 7 interview. The employer took appropriate and reasonable steps to investigate the matter before the April 27 interview, between the April 27 and May 7 interview, and immediately following the May 7 interview. The employer took appropriate and

reasonable steps to review the matter and send it up the chain of command. No later than the interview on May 7, Mr. London clearly understood that his employment was jeopardy. No later than May 22, the employer gave formal notice of its intention to discharge him from the employment. The employer continued throughout to take reasonable and timely steps to thoroughly address and act upon the matter. Ultimately, Mr. London involuntarily separated from the employment on June 1, 2012 by means of a quit in lieu of a discharge.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. London was discharged for a current act of misconduct. The misconduct involved misappropriation of state property and resources for personal use and intentionally providing false information as part of an investigation. Mr. London's position was one that depended entirely on the employer's ability to trust him. Mr. London violated that trust and acted in a manner that demonstrated willful and wanton disregard of the employer's interests. Accordingly, Mr. London is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

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 whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The Agency representative's June 26, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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