

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

AARON THOMAS
Claimant

APPEAL NO. 18A-UI-03145-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASSISTED LIVING CONCEPTS LLC
Employer

OC: 02/18/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 6, 2018, reference 01, decision that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on February 19, 2018 for failure to follow instructions in the performance of his job. After due notice was issued, a hearing was held on April 5, 2018. Claimant Aaron Thomas participated. Jean Milburn represented the employer. Exhibits 1 through 3 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: Aaron Thomas was employed by Assisted Living Concepts, L.L.C. d/b/a Pinicon, a senior living community, as the full-time chef from July 2016 until February 19, 2018, when Swarnali Banerjee, Corporate Human Resources Director, discharged him from the employment for alleged misconduct in connection with the employment. Jean Milburn, Executive Director, and Ms. Banarjee notified Mr. Thomas of the discharge decision.

The final incident the employer sites as the trigger for the discharge concerned Mr. Thomas' removal of a notice that Tami Kurkove-Kray, Care Service Specialist, had posted on a refrigerator door in kitchen on or about February 10, 2018. The notice directed kitchen staff to used disposable dishes and cutlery due to a concern about the spread of influenza. Mr. Thomas noted the posting on the refrigerator. Mr. Thomas noted that the posting indicated it was by order of the management, but knew he had not been involved in a discussion regarding use of disposable dishes or cutlery. Mr. Thomas was unaware of any influenza issue at the facility at that time and knew that the kitchen lacked sufficient supplies to comply with the instruction. Mr. Thomas did not know who had posted the notice. Mr. Thomas removed the posting and placed it in his office. Mr. Thomas had authority and discretion to remove the sign

posted in the kitchen. On Monday, February 12, 2018, Patricia Stoll, Care Service Manager, notified Ms. Milburn that Mr. Thomas had removed the sign. Ms. Stoll is the nurse assigned to the facility. Ms. Stoll is Ms. Kurkove-Kray's daughter. Ms. Stoll asserted to Ms. Milburn that Mr. Thomas has "ripped down the sign," though Ms. Stoll had not seen Mr. Thomas remove the sign. Similar signs were posted in other areas of the employer's facility. Ms. Milburn spoke with Mr. Thomas regarding the matter, advised Mr. Thomas that the sign needed to be posted, and provided him with another sign to replace the one Mr. Thomas had removed. Though Mr. Thomas had removed the sign, he had assisted in obtaining the additional needed disposable items and had implemented use of the disposable items as the posted notice had directed.

The corporate Human Resources Director's decision to discharge Mr. Thomas occurred four days after Mr. Thomas had told the corporate Dietary Director that if the employer better compensated dietary staff, the staff would require less corporate oversight. Mr. Thomas was in essence complaining about his compensation and compensation of his subordinates.

In making the decision to discharge Mr. Thomas from the employment, the employer considered a number of prior concerns. The most recent prior incident that factored ostensibly in the discharge decision occurred during the first week of December 2017.

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 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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record fails to establish a current act of misconduct. The evidence indicates that Mr. Thomas exercised his authority and judgment on February 10, 2018 to remove a sign that someone had posted in the kitchen without his knowledge and a time when Mr. Thomas knew the kitchen did not have sufficient supplies to follow the sign's instructions. The evidence fails to establish any ill intent on the part of Mr. Thomas in removing the sign. The evidence establishes that Mr. Thomas took subsequent steps to implement the use of disposable dishes and cutlery. The evidence indicates that Mr. Thomas cooperated with and facilitated implementation of the use of disposable dishes and cutlery. The administrative law judge notes that the employer elected not to present testimony from Ms. Kerkove-Kray or Ms. Stoll concerning the final incident that ostensibly triggered the discharge. The employer had the ability to present such testimony. Though the evidence indicated earlier incidents involving misconduct on the part of Mr. Thomas, those matters dated from early December 2017 or earlier and did not constitute "current acts" for the purpose of adjudicating Mr. Thomas' eligibility for unemployment insurance benefits or the employer's liability for benefits. Because

the evidence does not establish a current act of misconduct, the administrative law judge need not further consider the earlier concerns.

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

DECISION:

The March 6, 2018, reference 01, decision is reversed. The claimant's discharge was not based on a current act of misconduct. 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