

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

DAVID K RUSSELL
Claimant

GLOBAL SECURITY SERVICES – IA LTD
Employer

APPEAL NO. 23A-UI-04143-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/26/23
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) & (d) – Discharge

STATEMENT OF THE CASE:

On April 21, 2023, David Russell (claimant) filed a timely appeal from the April 13, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on March 29, 203 for violation of a known company rule. After due notice was issued, a hearing was held on May 8, 2023. Claimant participated. Steven Motley represented the employer. Exhibits 1, 2, A, B, and C were received into evidence. Claimant's Exhibit D was not 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:

David Russell was employed by Global Security Services – IA Ltd. as a full-time armed security officer from May 2022 until March 29, 2023, when the employer discharged him from the employment. For most of the employment, the claimant was assigned to Iowa National Guard Camp Dodge. The claimant's duties included screening individuals entering the post and patrolling the post. The claimant would operate a motor vehicle as part of his work duties. The claimant was required to maintain a valid driver's license as a condition of the employment. The claimant performed his duties in concert with other armed security officers assigned to the post.

The final incident that factored in the discharge concerned the claimant's text message report to his supervisor, Sgt. Pigman, on the morning of March 28, 2023 regarding a disturbing incident involved a fellow security officer during the claimant's shift on the evening of March 27, 2023. The weight of the evidence indicates the claimant had a bona fide concern about a threatening utterance and threatening conduct perpetrated by a fellow security officer. Early in the shift, Security Officer Drew Lowe made comments in the presence of the claimant and Security Officer Jeff Love regarding being depressed and abusing alcohol the previous evening. Shortly

thereafter, Security Officer Love left for the day. The claimant, Lowe and Security Officer Richard Hisimana remained on duty. At about 8:00 p.m., Hisimana briefly exited the guard shack. During that time, Lowe yelled at the claimant to be quiet and stated he had a headache. The claimant replied that he had not been loud. Lowe threatened to shoot the claimant if the claimant did not speak quietly. Lowe briefly unholstered his employer-issued sidearm in conjunction with uttering the threat. There was no supervisor on duty at the time. When Hisimana stepped back into the guard shack, the claimant told Hisimana about Lowe's threatening utterance and conduct. Based on Lowe's earlier comments about being depressed and abusing alcohol, and based on the threat involving a firearm, the claimant was concerned about further escalating the situation if he called Sgt. Pigman to report the conduct during the shift. The claimant finished his shift at 10:00 p.m. on March 27, 2023. At 5:08 a.m. on March 28, 2023, the claimant reported the incident to Sgt. Pigman. The claimant was initially circumspect and indicated a desire to wait until he could speak with Pigman in person on March 29, 2023 to share details. Without naming Lowe, the claimant repeatedly expressed concern about a fellow security officer possessing a gun. When Pigman asked whether Lowe was the person the claimant was concerned with, the claimant confirmed it was Lowe.

Steven Motley, Assistant Director of Operations for Global Security Services – IA Ltd., investigated the alleged threat by speaking with Sgt. Pigman and by soliciting information via email from each of the security officers who had been on duty during the March 27 shift. Mr. Motley concluded the claimant's allegation was baseless and false. The employer has provided for the appeal hearing Mr. Motley's email exchanges with Security Officers Lowe and Love. Lowe denied threatening the claimant and denied unholstering his gun. Love acknowledged Lowe speaking early in the shift about depression and alcohol abuse, but advised that Love then left the workplace and was not present for anything that happened later. The employer has conspicuously omitted email correspondence with Security Officer Hisimana regarding the March 27 shift or any concern the claimant shared with Hisimana during the shift. The claimant's comments to Sgt. Pigman and to Mr. Motley remained consistent. The claimant has provided a text message exchange with Hisimana from March 29, 2023, the day the claimant was discharged. When the claimant told Hisimana that he had been fired and that the employer did not care about his concern, Hisimana replied that was only way the employer could silence the claimant.

Prior to the claimant's complaint about Lowe, Mr. Motley had been preparing to discharge the claimant in response to a March 1, 2023 complaint the claimant made about Sgt. Pigman. The employer's judgment regarding this earlier complaint factored in the employer's judgment regarding the later complaint about Lowe. On March 1, 2023, Mr. Motley sent an email message to the claimant indicating that the driver's license the employer had in its records for the claimant was expired and requesting the claimant provide his current driver's license. Mr. Motley copied Sgt. Clint Pigman in the email. The claimant had maintained a valid driver's license.

On March 1, 2023, Sgt. Pigman called the claimant to request that the claimant provide the updated driver's license Mr. Motley requested in his email. The claimant was upset that Sgt. Pigman called the claimant on his day off. The claimant was upset that the Sgt. Pigman called him at all to address the driver's license issue. The claimant felt there was no need for Sgt. Pigman to take any steps to follow up on Mr. Motley's email. At the time of the call, the claimant was dealing with a sensitive family matter, which factored in the claimant being perturbed by the call. Sgt. Pigman did not say or do anything inappropriate in connection with the call. On March 1, 2023, the claimant sent a written complaint to the employer regarding Sgt. Pigman's call. The claimant wrote:

Why pigman have to call me about this matter. He have seen me yesterday he say nothing to me. Comes today when I off from work he call me and making worrying about my family member. To me he knew I was off from work. Why not wait until I am back to work. Two I would have given you this information once I read this email. I am tired of this bs disrespectful and hate against color people.

The employer investigated the claimant's complaint as an allegation of race-based harassment and discrimination. The claimant is black. After looking into the matter, the employer concluded, and the claimant conceded, that Sgt. Pigman had merely been performing his job by contacting the claimant to follow up on Mr. Motley's email to solicit the claimant's updated driver's license. Mr. Pigman had in fact not been disrespectful, harassing or discriminatory toward the claimant. The employer determined the claimant's allegation of harassment and discrimination to be baseless and false. As of March 3, 2023, the matter appeared to be resolved. The administrative law judge notes that the claimant reverted in his April 21, 2023 appeal letter to alleging that on March 1, 2023 Sgt. Pigman "was calling to Harass me." See *Exhibit A*.

On March 14, 2023, Mr. Motley sent an email message to Sgt. Pigman regarding his plan to end the claimant's employment in response to the March 1, 2023 complaint. Mr. Motley wrote:

I will not be replacing Mr. David Russell uniforms as Mr. Russell will soon be separated from GSS employment due to his false accusations towards you. If Mr. Russell asks you about the request for uniforms, then you can inform him that corporate is handling it. In the meantime, if Mr. Russell does anything against policy, then you are to issue him a DA.

Prior to notifying the claimant on March 29, 2023 that he was discharged from the employment, the employer did not notify the claimant his employment was in jeopardy in connection with the March 1, 2023 complaint.

Though it was not a primary factor in the discharge, the employer also considered a client's decision in late 2022 to discontinue the claimant's work at a facility that served individuals with disabilities. The decision to terminate the claimant's work at that post was based on the claimant and the client have a disagreement regarding how best to operate the facility a secure manner.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Willful and deliberate falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer's or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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 Iowa Administrative Code rule 871-24.32(4).

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence establishes the claimant’s March 28, 2023 report concerning Lowe arose from a reasonable, bona fide concern that was neither baseless nor false. The employer presented insufficient evidence to rebut the evidence that indicated the claimant had a valid concern. The evidence indicating the claimant had a valid concern included the text messages between the claimant and Pigman and the email correspondence between the claimant and Mr. Motley. As the claimant noted during the hearing, and as indicated in the Findings of Fact, the employer conspicuously omitted email correspondence or other statement from Hisimana regarding the events on March 27. The administrative law judge further notes the employer elected not to present testimony from any of the parties with personal knowledge of the events of March 27, whereas the claimant testified from personal knowledge and consistent with the concerns he brought to the employer’s attention on March 28. The evidence establishes no misconduct on the part of the claimant in connection with the March 28 complaint.

The earlier matters that factored in the discharge were not “current acts” for purposes of determining the claimant’s eligibility for unemployment insurance benefits. The claimant’s March 1, 2023 complaint about Sgt. Pigman came to the employer’s attention that day and had been fully investigated by March 3, 2023. Though the employer had made the decision on or before March 14, 2023 to discharge the claimant in response to the March 1 complaint, the employer unreasonably delayed telling the claimant the March 1 complaint placed his employment in jeopardy until March 29, 2023. The 2022 concern about termination of the claimant’s work at another post was too remote to be deemed a current act and does not appear to have involved any misconduct on the part of the claimant.

The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The April 13, 2023 (reference 01) decision is REVERSED. The claimant was discharged on March 29, 2023 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

May 16, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.