

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DYLAN M MIZOUR
Claimant

APPEAL NO. 18A-UI-10030-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORTHWEST BLVD INC MCDONALDS #282
Employer

OC: 09/09/18
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 September 24, 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 September 6, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on October 17, 2018. Claimant Dylan Mizaur participated. Megan Milligan of Employers Unity represented the employer and presented testimony through Pam Ceneceros. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 2, 3 and 5 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: Dylan Mizaur was employed by Northwest Boulevard, Inc., d/b/a McDonald's, as a part-time crew member from February 2018 until September 3, 2018, when Pam Ceneceros, General Manager, discharged him from the employment. Mr. Mizaur worked at the employer's Davenport restaurant. Mr. Mizaur last performed work for the employer on August 26, 2018. Mr. Mizaur is a mildly intellectually disabled person. During the shift on August 26, a fellow crew member, Cynthia Kirk repeatedly called Mr. Mizaur "slow." Mr. Mizaur interpreted the utterance as a reference to his disability, as an assertion that he was, in his words, "stupid and retarded." In conversation with another crew member, Mr. Mizaur stated, "If someone else calls me slow, I'm going to stab someone." The manager on duty, Nicole Hadikmamma, overheard the

utterance, and sent Mr. Mizaur home for the day and notified Ms. Ceneceros. On August 27, Ms. Ceneceros spoke to Mr. Mizaur regarding the incident. Mr. Mizaur admitted to making the utterance, but asserted that the utterance was not directed at Ms. Kirk. Ms. Ceneceros told Mr. Mizaur that the company does not tolerate that kind of language and that Mr. Mizaur was suspended for a week. Ms. Ceneceros directed Mr. Mizaur to return on September 3, 2018. On September August 29, 2018, Ms. Ceneceros spoke with Ms. Kirk. Ms. Kirk alleged that Mr. Mizaur got angry when she asked him to clean up a mess he had made at one of the machines. Ms. Kirk alleged that Mr. Mizaur stated that he would clean up the mess when he got a minute and that he stated he was going to stab her. When Mr. Mizaur returned to the workplace on September 3, following the suspension, Ms. Ceneceros told him was discharged for making a threatening remark.

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).

An employer has the right to expect decency and civility from its employees and an employee’s use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior’s authority. *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418 (Iowa Ct. App. 1989). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See *Myers v Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The weight of the evidence establishes a discharge for no disqualifying reason. Mr. Mizaur is the only witness who testified from personal knowledge regarding the August 26 incident. The employer had the ability to present testimony through Ms. Kirk and/or Ms. Hadikmamma, but elected not to present such testimony. The employer presented insufficient evidence to rebut Mr. Mizaur’s testimony regarding the August 26 incident. The weight of the evidence establishes that Mr. Mizaur responded to an utterance he perceived to be a demeaning comment regarding his disability by making an off-the-cuff remark that, “If someone one calls me slow, I’m going to stab someone.” The utterance, taken in context, was nothing more than an expression of frustration. A reasonable person would not have perceived the utterance as a bona fide or credible threat of violence. While the utterance arose from poor judgment on the part of Mr. Mizaur, the utterance, taken in context, was not in willful or wanton disregard of the employer’s interests and did not constitute misconduct in connection with the employment that would disqualify Mr. Mizaur for unemployment insurance benefits. Mr. Mizaur is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The September 24, 2018, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge date was September 3, 2018. 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