IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAUL DIBIASE
Claimant

REMBRANDT ENTERPRISES INC
Employer

APPEAL NO. 12A-UI-01696-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/08/12
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Paul Di Biase filed a timely appeal from the February 9, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 7, 2012. Mr. Di Biase participated. Sally Brecher represented the employer and presented additional testimony through Keith Hartman. The administrative law judge took official notice of the Agency administrative file documents submitted for and generated in connection with the fact-finding interview. Exhibits One through Nine were received into evidence. Exhibits One through Five were duplicates of the officially noticed fact-finding materials.

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: Paul Di Biase was employed by Rembrandt Enterprises as a full-time machine operator from 2009 until January 9, 2012, when Sally Brecher, Human Resources Manager, and David Plagman, Operations Manager, discharged him from the employment. On January 9, 2012, Ms. Brecher and Mr. Plagman met with Mr. Di Biase to discuss complaints the employer had received from two maintenance techs regarding Mr. Di Biase conduct toward them and their desire not to work with Mr. Di Biase. The two techs were Nate Henrich and Ed Gonzales. During the January 9, 2012 meeting, the employer notified Mr. Di Biase that he was being suspended for 1.5 days based on the complaints the employer had received.

As Mr. Di Biase was in the process of exiting the workplace, he stopped to speak with two coworkers: Keith Hartman and Taylor Boggs. Mr. Di Biase and these two coworkers had had a good, amiable working relationship up to that point. Mr. Di Biase was angry. Mr. Di Biase told Mr. Hartman and Mr. Boggs that if he saw Nick Henrich outside of work he was "going to fucking kill him." Mr. Hartman and Mr. Boggs believed the threat to be credible and immediately went to Ms. Brecher's office to report it. Ms. Brecher directed both to write a statement indicating in their own words what had happened. Both prepared independent statements in which they said

Mr. Di Biase had threatened to kill Mr. Henrich. Ms. Brecher summoned Mr. Plagman back to her office and telephoned Mr. Di Biase to ask him to return. Ms. Brecher told Mr. Di Biase about the report she had just received, cited he employer's zero-tolerance workplace violence policy and told Mr. Di Biase that he was being discharge from the employment for violating that policy.

The employer had a written conduct policy that prohibited threatening to injury another person. The employer had a written, zero-tolerance policy regarding workplace violence. The policy directed employees who heard such threats to immediately report then to a manager/supervisor or to the human resources department. Mr. Di Biase received and signed for the employee handbook containing the policies.

In February 2011, Mr. Henrich had complained to a supervisor after an argument with Mr. Di Biase. That complaint had triggered Mr. Di Biase's supervisor to issue a written reprimand.

REASONING AND CONCLUSIONS OF LAW:

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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

The weight of the evidence in the record establishes that on January 9, 2012, Mr. Di Biase did indeed utter that threat to harm Mr. Henrich as reported by Mr. Hartman and Mr. Boggs. At the time, Mr. Di Biase has just been suspended and was angry. Neither Mr. Hartman nor Mr. Boggs had a reason to fabricate a statement and attribute it to Mr. Di Biase. Contrary to Mr. Di Biase's assertion about having only said that he would "talk" to Mr. Henrich outside of work, the weight of the evidence establishes he threatened to "fucking kill him." The prior complaints Mr. Henrich had made about Mr. Di Biase paint a very different picture from the friendly relationship Mr. Di Biase asserts they had. The threat Mr. Di Biase uttered was in violation of the employer's established policies and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Di Biase was discharged for misconduct. Accordingly, Mr. Di Biase 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 for benefits paid to Mr. Di Biase.

DECISION:

The Agency representative's February 9, 2012, reference 01, decision is affirmed. 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. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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