

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AARON D ANDREWS
Claimant

APPEAL NO. 17A-UI-00421-TNT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERBEND HOLDINGS LLC
Employer

OC: 12/11/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a -- Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated January 10, 2017, reference 01, which denied unemployment insurance benefits, finding the claimant was discharged from work on December 8, 2016, for fighting on the job. After due notice was provided, a telephone hearing was held on February 2, 2017. The claimant participated. Although duly notified, there was no participation by the employer.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: As the employer did not participate in the hearing, all findings of fact are derived from the claimant's testimony. Aaron Andrews began employment with Riverbend Holdings LLC dba Bix Basements, a basement and foundation repair business, on June 16, 2014. The claimant was discharged from his employment on December 8, 2016. At the time of discharge, Mr. Andrews was employed full-time as a crew foreman and was paid by the hour, plus commission. His immediate supervisor was Mr. Tony Vanorder.

The claimant was discharged on December 8, 2016, following an incident that had taken place at the company's facility that morning. A verbal exchange had taken place between Mr. Andrews and another foreman after the other foreman referred to Mr. Andrews as, "a stupid dumb motherfucker" while questioning Mr. Andrews about the manner in which he was loading equipment onto a truck. The claimant did not think that he was improperly loading the equipment and was angered by the language being directed to him. Mr. Andrews responded in a similar manner, using similar language.

While the parties continued to verbally argue, Mr. Vanorder arrived at the scene and pushed Mr. Andrews to the wall and held him. The other foreman was not similarly restrained. Mr. Andrews attempted to explain that there had been no physical exchange between the parties, but when he continued to be held against the wall, he told his foreman to remove his hands stating, "get your fucking hands off me." The claimant was sent home from work at that time and later

informed of his termination by text message. Mr. Andrews testified that the employer subsequently offered him his job back when the seasonal work begins.

The claimant had not been previously warned or counselled about arguing on the job or using inappropriate language. Mr. Andrews testified that the use of rough language is common in the work place and that he is not aware of any specific company policies about arguing or hostility on the job.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct on the part of this claimant sufficient to warrant the denial of unemployment insurance benefits; it does not.

Iowa Code § 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.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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).

In this matter, the claimant participated personally testified under oath offering firsthand testimony regarding the incident that caused his discharge from employment. The claimant testified that he was not the aggressor during a verbal confrontation that had taken place on the morning of December 8, 2016, and that the incident between himself and another foreman did not escalate beyond a verbal exchange that morning. The claimant further testified that he directed inappropriate language toward the other foreman, only after the other worker had used derogatory language and name-calling toward Ms. Andrews. The claimant did not intentionally direct profanity or offensive language towards Mr. Vanorder in a confrontational or name-calling context, but only to emphasize that he wanted Mr. Vanorder to release him from being held. Mr. Andrews had not been previously warned or counselled about similar conduct and the use of rough language is not an unusual occurrence in the work place.

There being no evidence to the contrary, the administrative law judge concludes the verbal exchange between the claimant and the other foreman, as well as the statement he made to his supervisor that day, is in the nature of an isolated instance of poor judgement in an otherwise unblemished employment history.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation and has not provided any testimony that was contrary to the claimant's firsthand testimony, the employer has not met its burden of proof to establish that the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning.

The employer has not met its burden of proof to establish disqualifying misconduct on the part of the claimant. Accordingly, the claimant is eligible to receive unemployment insurance benefits, provided that he meets all other eligibility requirements of Iowa Law.

DECISION:

The representative's decision dated January 10, 2017, reference 01, is reversed. The claimant was discharged for not disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terry Nice
Administrative Law Judge

Decision Dated and Mailed

rvs/rvs