

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA C MACE
Claimant

APPEAL NO. 13A-UI-12667-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION
Employer

OC: 10/13/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Pamela Mace filed a timely appeal from the November 4, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 3, 2013. Ms. Mace participated. Terry Ubben represented the employer. Exhibits A and B 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: Pamela Mace was employed by Burke Marketing Corporation on a full-time basis from 1995 until October 16, 2013, when Bob Fogleson, Line 2 Supervisor, and Terry Ubben, Human Resources Manager, discharged her from the employment for fighting on the job. Mr. Fogleson was Ms. Mace's immediate supervisor. The employer has a written policy that prohibits "Disorderly conduct or fighting on or off Burke premises when on company business." The policy was contained in the employee handbook. Ms. Mace received a copy of the handbook and was familiar with the policy.

The incident that triggered the discharge occurred on October 9, 2013. As Ms. Mace was training a new employee, coworker Paul Graves interrupted her a number of times and interfered with training of the new employee. Mr. Graves did not heed Ms. Mace's requests that he leave the area. Ms. Mace grabbed Mr. Graves by the arm and began to direct him out of the area. Mr. Graves backed up into Ms. Mace and told her that he would kick her fucking ass and make her cry. Ms. Mace became angry, pushed on Mr. Graves' chest, placed her hand around his neck, and pinned him to a wall. Mr. Graves reported the incident to the employer. On October 11 or 12, the employer interviewed Ms. Mace about the incident. At that time, Ms. Mace admitted to the conduct described above. Ms. Mace's conduct was not in self-defense. On October 16, 2013, the employer discharged Ms. Mace, based on its zero-tolerance policy for violence in the workplace.

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).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The weight of the evidence in the record establishes that Ms. Mace did indeed engage in fighting in the workplace on October 9, 2013 in willful violation of the employer's written policy. Ms. Mace initiated the physical contact and escalated the physical contact. None of Ms. Mace's actions were in self-defense. Ms. Mace's actions constituted misconduct in connection with the employment. Accordingly, Ms. Mace is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The Agency representative's November 4, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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