

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VAHIDIN SPAHIC
Claimant

APPEAL NO: 15A-UI-01871-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES REGIONAL TRANSIT AUTH
Employer

OC: 01/18/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Vahidin Spahic (claimant) appealed a representative's February 9, 2015 (reference 01) decision that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Des Moines Regional Transit Authority (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on March 16, 2015. The claimant participated in the hearing and was represented by Laura Jontz, Attorney at Law. Steve Hansen appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on July 9, 2012. Most recently he worked full time as a bus servicer on an evening shift. His last day of work was January 22, 2015. The employer discharged him on that date. The reason asserted for the discharge was progressive discipline, with a final incident being a purported verbal altercation on January 8.

The employer had previously given the claimant a verbal warning on March 7, 2014 regarding verbal confrontations after he had made a complaint to the employer about harassment from another employee. He had been given a written warning on July 10, 2014 for a safety issue and he had been given a suspension and final warning on September 10, 2014 for another safety issue. The final warning had advised him that the next step in the disciplinary process for any policy violation would be discharge.

On January 8, 2015 the claimant was waiting in the break room with two coworkers for instructions prior to the start of the shift. He had been speaking with one coworker, "Pete," asking if Pete wanted to switch work assignments for the night, as the prior night Pete had commented that the claimant was working too slowly. The second employee, "Richard," interjected and told the claimant, "Do your job." The claimant replied to Richard, "You are not authorized to tell me what to do." The supervisor came in at that time and told them to be quiet so he could give them instructions.

When the supervisor finished and started to leave, the claimant resumed speaking with Richard, at which point Richard made a loud, rude remark and abruptly left the area. The claimant filled out and filed an incident report/complaint regarding the situation and turned it into the employer. The supervisor reported the matter to human resources the same or the next day. The employer did not discuss the matter further with the claimant until January 20 but did not tell him even then that his own conduct in the matter was being investigated. On January 22 the employer advised him that his conduct in the matter was inappropriate because he had been "loud and aggressive" and that since he was already on a final warning, the next step in the process was discharge.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts; the termination of employment must be based on a current act of misconduct. Rule 871 IAC 24.32(8).

The reason cited by the employer for discharging the claimant is progressive discipline with an asserted final act of misconduct on January 8, 2015 through a verbal confrontation in which the employer asserted the claimant had been "loud and aggressive." The employer relies exclusively on the second-hand account from the supervisor and other persons who had been present on January 8; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those persons might have been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of their reports. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact was inappropriate or loud and aggressive on January 8, 2015. Further, there is no current act of misconduct as required to establish work-connected misconduct. Rule 871 IAC 24.32(8); *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred two weeks prior to the employer's notification to the claimant at the time of discharge that his own conduct was under review for potential discipline.

The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute and the claimant is not disqualified from benefits.

DECISION:

The representative's February 9, 2015 (reference 01) decision is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/can