

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**NERMIN ODOBASIC
1826 ROBIN RD
WATERLOO IA 50701**

**OMEGA CABINETS LTD
1205 PETERS DR
WATERLOO IA 50703**

**ADNAN MAHMUTAGIC
ATTORNEY AT LAW
620 LAFAYETT ST
WATERLOO IA 50703**

**Appeal Number: 05A-UI-04842-JTT
OC: 04/10/05 R: 03
Claimant: Appellant (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Nermin Odobasic (claimant) filed a timely appeal from the April 27, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 16, 2005. Mr. Odobasic was represented by attorney Adnan Mahmutagic and personally participated in the hearing. The employer participated through Josh Schmidt, Human Resources Representative. Bosnian-Croatian Interpreter Zijo Sucasca assisted with the hearing. Exhibits One through Six and Eight through Ten were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nermin Odobasic was employed by Omega Cabinets as a full-time woodwork production

worker from January 20, 1998 until April 12, 2005, when Human Resources Representative Josh Schmidt discharged him for engaging in physical violence in the workplace.

The final incident that prompted the discharge occurred on April 8, 2005. On that date, Production supervisor Mike Hewitt contacted Human Resources Representative Josh Schmidt to notify him there had been a verbal dispute on the plant floor between Mr. Odobasic and Lead Person Nicole Hahn that had escalated to physical contact between the two. Mr. Hewitt had not witnessed the incident. Ms. Hahn had reported the incident to Mr. Hewitt. Ms. Hahn had reported that she had been trying to provide instruction to Mr. Odobasic when an argument began and he pushed her.

Mr. Schmidt commenced an investigation into the matter. The employer's ability to determine from third-party witnesses the words exchanged between Mr. Odobasic and Ms. Hahn prior to the physical incident was limited by the fact that the work area is extremely loud and the employees wear earplugs. Mr. Schmidt spoke with Ms. Hahn, who provided a written statement. Ms. Hahn indicated in her statement that she had merely tried to communicate to Mr. Odobasic a deadline for processing a particular species of wood. Ms. Hahn indicated that Mr. Odobasic thought she was yelling at him and responded by telling her to "shut the fuck up." Ms. Hahn then went to Mr. Odobasic's workstation to advise that she had not been yelling at him and to advise him not to tell her to shut up. Ms. Hahn asserts in her letter that Mr. Odobasic then grabbed her wrist and shoved her back causing her stumble down the stairs of Mr. Odobasic's work platform. Ms. Hahn further indicated that she and Mr. Odobasic had previously argued on several occasions over various matters. Ms. Hahn later provided a second written statement in which she asserted Mr. Odobasic had expressed a personal interest in her, that she had rejected the overture, and that she believed Mr. Odobasic may have acted out of frustration in response to her rejection of him.

Mr. Schmidt next interviewed Mr. Odobasic. Mr. Odobasic provided a written statement through an interpreter. Mr. Odobasic asserted in the written statement that Ms. Hahn had yelled at him, had approached him at his workstation, pointed a finger at him, and touched his nose with her finger. Mr. Odobasic indicated in his statement that he responded by pushing Ms. Hahn's arm.

Mr. Schmidt then contacted Mr. Hewitt and inquired whether anyone else may have witnessed the incident. Mr. Hewitt advised employee Troy Cook might have witnessed the incident. Mr. Cook indicated that employee Carrie Streich had also witnessed the incident. Ms. Hahn notified Mr. Schmidt that employee Dori Heidt also witnessed the incident. Mr. Schmidt interviewed Mr. Cook and Ms. Streich on April 8 and both employees provided a written statement. Mr. Cook indicated in his written statement that Mr. Odobasic grabbed Ms. Hahn's wrist and pushed her back and that she almost fell down. Mr. Cook further asserted that Ms. Hahn had not touched Mr. Odobasic or done anything to provoke Mr. Odobasic. Ms. Streich indicated in her written statement that Mr. Odobasic had twice made physical contact with Ms. Streich. First, Ms. Hahn had held up three fingers to indicate to Mr. Odobasic that the workers were to leave at 3:00 p.m., and Mr. Odobasic grabbed Ms. Hahn's arm and pushed it away. Ms. Streich indicated that the second contact came when Ms. Hahn approached Mr. Odobasic's workstation and Mr. Odobasic responded by pushing Ms. Hahn in the shoulder area.

After Mr. Schmidt spoke with Cook and Streich, he again met with Mr. Odobasic, at which time he advised Mr. Odobasic that he was suspended and would notify Mr. Odobasic regarding his employment status.

On Monday, April 11, Mr. Schmidt interviewed employee Dori Heidt, who provided a written statement and indicated that employee Ben Freese had also witnessed the incident. Ms. Heidt indicated in her written statement that “it appeared as if [Mr. Odobasic] grabbed [Ms. Hahn’s] sweatshirt by her neckline and shoved her—[Ms. Hahn] was shoved hard enough to come backwards about 8 steps.”

Mr. Schmidt interviewed Mr. Freese the same day. Mr. Freese advised Mr. Schmidt that he observed Ms. Hahn move to go up to the platform where Mr. Odobasic was working to speak with him and further observed Mr. Odobasic push Ms. Hahn away with his left hand.

On April 12, Mr. Schmidt advised Mr. Odobasic that he was discharged from the employment based on the April 8 incident. There was no other basis for the discharge.

The employer has a written policy prohibiting violence in the workplace. The policy is set forth in an employee handbook. On January 20, 1998, Mr. Odobasic signed his acknowledgement of receipt of the handbook. Mr. Odobasic apparently does not read English and Mr. Schmidt does not know whether the employer utilized an interpreter to review the handbook or policies with Mr. Odobasic. Pursuant to the policy against violence in the workplace, any employee found to have engaged in such behavior is discharged upon the first violation.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Odobasic was discharged for misconduct in connection with his employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since Mr. Odobasic was discharged, 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).

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 evidence in the record establishes that on April 8, 2005, Mr. Odobasic engaged in a physical altercation in the workplace. The employer provided several written statements collected from employees who were eyewitnesses to the physical altercation. The employer collected the statements in the course of investigating the matter and met with each employee separately and as close in time to the event as was possible. All of the statements, including Mr. Odobasic's statement, indicate that Mr. Odobasic pushed Ms. Hahn. Mr. Odobasic testified that he had a reflex response to Mr. Hahn touching his nose and pushed her away. Considering this testimony in light of the other evidence submitted into the record, the administrative law judge concludes that Ms. Hahn did not touch Mr. Odobasic or do anything else to provoke Mr. Odobasic to respond with physical aggression. Mr. Odobasic did not have a reflex response and did not act in self-defense. Based on the weight of the evidence, the administrative law judge concludes that Mr. Odobasic assaulted Ms. Hahn as she approached his workstation to clarify directions she had been instructed to pass along and to advise Mr. Odobasic not to address abusive language towards her.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Odobasic was discharged for misconduct. Accordingly, Mr. Odobasic 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 shall not be charged for benefits paid to Mr. Odobasic.

DECISION:

The Agency representative's decision dated April 27, 2005, reference 01, is affirmed. The claimant was discharged for misconduct in connection with his employment. The claimant 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 shall not be charged for benefits paid to the claimant.

jt/kjw