

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**JEREMY M HUBBARD**  
Claimant

**APPEAL NO. 19A-UI-05499-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BURLINGTON STAGE LINES LTD**  
Employer

**OC: 06/09/19**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 2, 2019, reference 01, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on June 12, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on August 2, 2019. The claimant did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Taylor Toops represented the employer and presented additional testimony through Sara McGee. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which record reflects that no benefits have been disbursed to the claimant in connection with the June 9, 2019 original claim. Exhibits 1 and 2 were received into evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Burlington Stage Lines, Ltd. is a motor-coach company. Jeremy Hubbard was employed by Burlington Stage Lines as a full-time bus cleaner from 2014 until June 12, 2019, when Matt Moore, Executive Vice President, and Ron Moore, President, discharged him from the employment. The discharge was based on two events that occurred close in time on June 9, 2019. On that day, Mr. Hubbard discharged wastewater from a bus's sanitation tank into a storm drain near the employer's Davenport shop in knowing and intentional violation of the employer's practices and in violation of the law. The conduct was caught on surveillance video. On June 12, 2019, Mr. Hubbard signed a written reprimand to indicate his agreement with the employer's version of the dumping incident. The second concern from June 9, 2019 involved Mr. Hubbard directing a vulgar gesture at the bus's surveillance camera. The employer captured the vulgar gesture in a photo. The photo depicts Mr. Hubbard raising the middle finger on each hand while looking directly into the surveillance camera. The employer has a business ethics and conduct policy that requires employees to exercise good judgment and comply with all laws and regulations. Mr. Hubbard was at all relevant times aware of the policy.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418 (Iowa Ct. App. 1989).

The evidence in the record establishes a discharge for misconduct in connection with the employment. On the one hand, the employer witnesses did not observe the alleged conduct, did not review the alleged surveillance video, and did not speak with the claimant about the alleged conduct. In addition, the employer elected not to submit the video of the alleged conduct or even a photo of the alleged conduct and the employer elected not to have the person who allegedly viewed the video testify at the appeal hearing. On the other hand, the employer presented as evidence a written reprimand that bears Mr. Hubbard's signature and an indication that Mr. Hubbard agreed with the employer's version of dumping incident. The claimant's vulgar gesture does not by itself rise to the level of disqualifying misconduct. The gesture was directed at a camera, not at a particular person and not at a particular supervisor. However, the gesture closely followed the dumping incident. The two actions together conveyed a willful and wanton disregard of the employer's interests. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

Because no benefits have been disbursed in connection with the claim, there is no overpayment of benefits to be addressed.

**DECISION:**

The July 2, 2019, reference 01, decision is reversed. The claimant was discharged on June 12, 2019 for misconduct in connection with the employment. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet 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

jet/rvs