

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORTEZ D SMITH
Claimant

APPEAL NO. 07A-UI-04281-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OMEGA CABINETS LTD
Employer

**OC: 03/25/07 R: 03
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Cortez Smith filed a timely appeal from the April 25, 2007, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on May 14, 2007. Mr. Smith participated.

The employer did not participate. Notice of the hearing was mailed to the parties on April 30, 2007. On May 7, the employer responded to the notice and provided the names of the individuals who would be participating in the hearing, as well as a telephone number at which they could be reached for the hearing: Chase Thornburgh and Paul Froehner at 319-235-5707. At the scheduled start of the hearing, Mr. Thornburgh advised the administrative law Judge that he had a scheduling conflict and would not be participating in the hearing. Mr. Thornburgh had apparently failed to put the hearing on his calendar and had obligated himself to participate in a different matter at the scheduled time for the hearing. The administrative law judge asked whether Mr. Froehner or another individual was available to represent the employer. Mr. Thornburgh indicated no one was available to represent the employer and that the employer would rely upon the documents submitted for the fact-finding interview. The administrative law judge advised Mr. Thornburgh that the documents submitted to the fact-finder were not part of the hearing record and that the notice for the hearing notified the employer of this. Mr. Thornburgh reiterated that the employer would not be participating in the hearing.

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: Cortez Smith was employed by Omega Cabinets as a full-time parts sander until March 26, 2007, when a human resources representative suspended him pending possible termination. On March 27, supervisor Paul Froehner and human resources representative notified Mr. Smith that he was discharged from the employment.

The final incident that prompted the suspension and discharge occurred on Friday, March 23, 2007 and involved a verbal dispute between Mr. Smith and a female coworker over distribution of work amongst several sanders. The female coworker initiated the dispute and escalated the dispute through offensive epithets and by poking Mr. Smith in the back of the head with her finger. Mr. Smith responded to the coworker's offensive language with offensive language of his own. A lead worker intervened. Mr. Smith then stepped outside a nearby door to cool down. On Monday, March 26, the employer conducted an investigation and suspended the female employee and Mr. Smith. On March 27, the employer notified Mr. Smith that he would be discharged from the employment based on this incident and a prior disagreement with the lead worker.

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.

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).

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).

The evidence in the record fails to establish, by a preponderance of the evidence, that Mr. Smith was discharged for misconduct in connection with the employment. The employer has failed to present any evidence whatsoever to support and/or corroborate an allegation of misconduct. Accordingly, misconduct is not established. See 871 IAC 24.32(4).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Smith was discharged for no disqualifying reason. Accordingly, Mr. Smith is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Smith.

DECISION:

The claims representative's April 25, 2007, reference 05, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs