

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS R IRLBECK
Claimant

APPEAL NO. 13A-UI-13969-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

**OC: 11/17/13
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Nicholas Irlbeck filed a timely appeal from the December 13, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 14, 2014. Mr. Irlbeck participated. Teresa McLaughlin represented the employer and presented additional testimony through Terry Lingner. Exhibits One, Two and were received Three into evidence.

ISSUE:

Whether the claimant was suspended or 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: Nicholas Irlbeck was employed by Fareway as a full-time meat clerk from 2009 and last performed work for the employer on November 21, 2013. At that time, the employer indefinitely suspended Mr. Irlbeck in connection with an altercation that had occurred on November 2, 2013. The altercation had occurred while Mr. Irlbeck was off-duty. The other participant in the altercation was Chris Legee, a part-time Fareway meat clerk who worked at the same store as Mr. Irlbeck. On November 2, Mr. Irlbeck entered the drinking establishment where Mr. Legee and other Fareway employees were gathered. Mr. Irlbeck walked up behind Mr. Legee and put Mr. Legee in a headlock. Mr. Irlbeck intended his conduct as roughhousing, but Mr. Legee perceived it only as aggression. Mr. Legee responded by standing up and shoving Mr. Irlbeck with sufficient force to cause Mr. Irlbeck to fall backwards and hit his head on a nearby table. Mr. Irlbeck was bleeding from his forehead. Mr. Legee remained in an aggressive posture and took a step toward Mr. Irlbeck. Mr. Irlbeck elbowed Mr. Legee in the face. Mr. Irlbeck could have retreated without elbowing Mr. Legee in the face, but elbowed Mr. Legee in the face out of anger. Mr. Irlbeck then left the drinking establishment. Mr. Irlbeck subsequently sought medical treatment then required stitches in his head.

On November 4, 2013, the matter came to the attention of the employer when Mr. Legee and Mr. Irlbeck both reported the matter to the employer. Mr. Irlbeck notify the employer that he had

been charged with assault in connection with the incident and had a court date set for January 6, 2014. From that point onward, Mr. Irlbeck's supervisor scheduled Mr. Irlbeck and Mr. Legee to work different schedules from one another. On November 19, the employer spoke with Mr. Irlbeck and notified him at that time that the incident could result in discipline. The employer then suspended Mr. Irlbeck effective November 21, 2013.

The employer has a written policy concerning employees' conduct outside of work. The policy is contained in the employee handbook that was provided to Mr. Irlbeck during his employment. The policy indicates that employees should avoid outside activities that would have a negative impact on the performance of their jobs, conflict with their employee obligation to the company, or negatively impact the company's reputation the community. The policy indicates that employees who fail to live up to the required standard of conduct will be subject to discipline. The policy indicates that conduct outside the employment that results in a criminal charge *and* subsequent conviction of a crime could result in termination of the employment.

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).

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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. Savage v. Employment Appeal Bd., 529 N.W.2d 640, 642 (Iowa Ct. App. 1995)

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). The employer must have a work rule that covers the off-duty conduct.

The employer had a work rule concerning employee conduct that extended to off-duty conduct. The work rule extended to situations such as the altercation in which Mr. Irlbeck was involved. Mr. Irlbeck instigated the altercation and continued the altercation by elbowing Mr. Legee in the face before Mr. Irlbeck left the scene of the confrontation. Mr. Irlbeck's conduct was not in self-defense and constituted misconduct. The employer's work rule and the fact that the matter involved multiple Fareway employees created enough of a nexus with the employment to make the conduct misconduct in connection with the employment.

Now we come to another issue, whether the conduct that triggered the indefinite suspension was a current act. It was not. The incident that gave rise to the suspension took place on November 2 and came to the employer's attention on November 4. The employer waited until November 19 to notify Mr. Irlbeck that the conduct could lead to discipline. The employer waited until November 21, to notify Mr. Irlbeck of the indefinite suspension. Given the employer's unreasonable delay between the employer's notice of the incident and the employer's notice to Mr. Irlbeck that he could or would face suspension or discharge in connection with the incident, the November 2 incident cannot serve as a basis for disqualifying Mr. Irlbeck for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Irlbeck was discharged for no disqualifying reason. Accordingly, Mr. Irlbeck is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's December 13, 2013, reference 01, 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