

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONY H DAMICO
Claimant

APPEAL NO. 08A-UI-01281-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC
Employer

**OC: 12/16/07 R: 04
Claimant: Appellant (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(5) – Duration of Benefits
871 IAC 24.29 – Business Closing

STATEMENT OF THE CASE:

Tony Damico filed a timely appeal from the January 29, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 20, 2008. Mr. Damico participated and presented additional testimony through Program Manager Renee Harmon. The employer elected not to participate. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUES:

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

Whether the claimant was laid off pursuant to a business closing.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tony Damico was employed by Access Direct Telemarketing as a full-time telephone service representative (TSR), or telemarketer, from November 19, 2002 until December 13, 2007, when Center Manager Jason Claussen and Program Manager Renee Harmon suspended him. On December 13, 2007, the facility where Mr. Damico worked was in its second to last day of operation. Mr. Damico and the other facility staff were scheduled to be laid off at the end of December 14, 2007. On December 13, the management staff left the facility for an end of employment celebration. The management staff left two senior representatives in charge of the facility. Mr. Damico was one of the two representatives left in charge. The telemarketing staff usually engaged in some mild form of play during the workday to relieve worker stress. One form of that play involved tossing a soft Nerf football. On December 13, while the management was away, one employee tossed a Nerf football and the football nearly hit another employee who was upset about the incident. The upset employee refused to relinquish the football until management returned. Mr. Damico directed the employee to unhand the football, but the upset employee insisted Mr. Damico was not a member of management and that he did not intend to

relinquish the football until management returned. Mr. Damico grabbed for the football. The upset employee then insisted that Mr. Damico had hit him in the shoulder. Mr. Damico had no intention to harm the other employee and had only grabbed for the football in a moment of poor judgment about how best to resolve the dispute between the upset employee and the employee who threw the football. The matter was reported to management upon their return. The management staff investigated and determined that nothing serious had transpired, but concluded it would be best to suspend Mr. Damico and the employee who threw the football for the remaining day and a half the facility would be in operation. The employer specifically advised Mr. Damico that the employer did not intend to adversely impact his eligibility for unemployment insurance benefits in connection with the facility's closing.

Mr. Damico established a claim for benefits that was effective December 16, 2007. The claim was not premised on the temporary suspension. Instead, the claim for benefits was premised on the lay-off in connection with the business closing.

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.

Where a claim for unemployment insurance benefits is premised on a suspension or disciplinary layoff, the claimant is considered as discharged and the issue of misconduct must be resolved. 871 IAC 24.32(4).

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).

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 employer has failed to present any evidence whatsoever to support an allegation that Mr. Damico was suspended or discharged for misconduct in connection with the employment. The evidence indicates instead that Mr. Damico was suspended for an isolated good-faith error in judgment about how best to resolve a dispute between two employees temporarily under his supervision. The evidence does not establish that Mr. Damico engaged in fighting in the workplace.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Damico was temporarily suspended for no disqualifying reason. The temporary suspension would not disqualify Mr. Damico for unemployment insurance benefits.

Iowa Code Section 96.3-5 provides:

5. Duration of benefits. The maximum total amount of benefits payable to an eligible individual during a benefit year shall not exceed the total of the wage credits accrued to the individual's account during the individual's base period, or twenty-six times the individual's weekly benefit amount, whichever is the lesser. The director shall maintain a separate account for each individual who earns wages in insured work. The director shall compute wage credits for each individual by crediting the individual's account with one-third of the wages for insured work paid to the individual during the individual's base period. However, the director shall recompute wage credits for an individual who is laid off due to the individual's employer going out of business at the factory, establishment, or other premises at which the individual was last employed, by crediting the individual's account with one-half, instead of one-third, of the wages for insured work paid to the

individual during the individual's base period. Benefits paid to an eligible individual shall be charged against the base period wage credits in the individual's account which have not been previously charged, in the inverse chronological order as the wages on which the wage credits are based were paid. However if the state "off indicator" is in effect and if the individual is laid off due to the individual's employer going out of business at the factory, establishment, or other premises at which the individual was last employed, the maximum benefits payable shall be extended to thirty-nine times the individual's weekly benefit amount, but not to exceed the total of the wage credits accrued to the individual's account.

871 IAC 24.29(2) provides:

(2) Going out of business means any factory, establishment, or other premises of an employer which closes its door and ceases to function as a business; however, an employer is not considered to have gone out of business at the factory, establishment, or other premises in any case in which the employer sells or otherwise transfers the business to another employer, and the successor employer continues to operate the business.

The weight of the evidence in the record establishes that Mr. Damico's claim for benefits was actually prompted by the business closing, rather than the 1.5 day temporary suspension. The evidence indicates that, effective December 14, 2007, Mr. Damico was laid off like the rest of the staff at the Keokuk facility. The layoff was in connection with a business closing. Mr. Damico's benefits should be redetermined accordingly.

DECISION:

The Agency representative's January 29, 2008, reference 01, decision is reversed. The claimant was suspended for no disqualifying reason. The claimant was laid off in connection with a business closing. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant. The claimant's benefits shall be redetermined as based on a layoff pursuant to a business closing.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw