

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY J WOLBERS

Claimant

APPEAL NO. 07A-UI-03923-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VOLT TECHNICAL RESOURCES LLC

Employer

**OC: 03/18/07 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Volt Technical Resources filed a timely appeal from the April 11, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 1, 2007. Claimant Terry Wolberg participated. Program Coordinator Elena Winter represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence.

ISSUE:

Whether the claimant was discharged from his temporary employment assignment for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Terry Wolbers was employed by Volt Technical Resources on a full-time basis from July 12, 2006 until March 21, 2007. Volt Technical Resources is a staffing agency or temporary employment agency. On July 12, 2006, Mr. Wolbers commenced an assignment at John Deere Dubuque Works, where he worked as a full-time graphics illustrator. The assignment ended on March 21, 2007, when Program Coordinator Elena Winter and John Deere Graphics Department Manager David Fitzgerald discharged him from the assignment and from the employment with Volt Technical Resources.

The final incident that prompted the discharge occurred on March 16, 2007 and came to the employer's attention the same day. The final incident concerned an e-mail message Mr. Wolbers sent to a coworker, J. Lueck, a few minutes after Mr. Wolbers confronted Mr. Lueck about launching large rubber bands at employees in a work area Mr. Wolbers shared with Mr. Lueck and other employees. Mr. Lueck had drawn back a large rubber band and pointed it at Mr. Wolbers. Mr. Wolbers was aware that Mr. Lueck's conduct placed Mr. Wolbers at risk of

serious injury and Mr. Wolbers felt threatened by the conduct. Mr. Wolbers told Mr. Lueck to stop. Mr. Lueck shrugged and asked Mr. Wolbers what he was going to do about it. Though Mr. Wolbers was civil in his face-to-face dealings with Mr. Lueck, he was somewhat less civil in the e-mail message he sent to Mr. Lueck immediately after the incident. The e-mail said, "If you hit me in the eye with a rubber band, what do you think I should do, or would do? Don't fuck with my future—you don't have to give a shit if I lose an eye."

Mr. Wolbers brought his e-mail, and the profanity contained therein, to the attention of Volt Technical Resources Program Coordinator Elena Winter. Ms. Winter summoned Mr. Lueck to her office and Mr. Lueck admitted to pointing a rubber band at Mr. Wolbers.

On March 21, Ms. Winter discussed Mr. Wolbers' e-mail with John Deere Graphics Department Manager David Fitzgerald. John Deere has a written policy that prohibited use of the company's electronic communication system to send messages that contain profane or offensive language. Mr. Wolbers was aware of the policy. Ms. Winter concluded that Mr. Wolbers should be discharged for violating the electronic communication policy. Mr. Wolbers had not previously violated the policy. However, on March 5, Mr. Wolbers had brought to Mr. Fitzgerald's attention his concern about the unstructured work environment.

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).

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 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 fails to establish, by a preponderance of the evidence, misconduct in connection with the employment that would disqualify Mr. Wolbers for unemployment insurance benefits. The evidence indicates that Mr. Wolbers' e-mail was fired off to Mr. Lueck within a few minutes of Mr. Wolbers confronting Mr. Lueck about a legitimate concern and the very real danger that Mr. Lueck's horseplay could result in serious injury to Mr. Wolbers. The e-mail also followed Mr. Lueck's cavalier response. Though the correspondence itself violated the letter of the employer's policy, the context of the correspondence somewhat justifies or excuses the transgression. Mr. Wolbers' inclusion of profanity in his e-mail message to Mr. Lueck was an isolated error in judgment arising out of a feeling being threatened with physical injury and was not directed at undermining the authority of a supervisor. Mr. Wolbers quickly realized his error and brought it to the attention of the employer.

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

DECISION:

The claims representative's April 11, 2007, reference 01, decision is affirmed. 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