

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DERREKE A THOMAS
Claimant

APPEAL NO. 09A-UI-11619-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUTTING EDGE INVESTMENTS INC
Employer

OC: 11/30/08
Claimant: Respondent (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated August 11, 2009, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 27, 2009. Claimant participated. Employer participated by Kevin Hardy, owner and president. The record consists of testimony from the following individuals: Dale Schrage; Jeremy Glenney; Jodi Hardy; Kevin Hardy; Ricky Clonch; and Derreke Thomas.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was originally hired in January 2007. He was a laborer for home remodeling; groundsman; and mechanic. The employer in this case has several different businesses and the claimant primarily worked for the tree trimming operation. The claimant was terminated on July 16, 2009.

The events that directly led to the claimant's termination started on the afternoon of July 13, 2009. The claimant and several other employees were on a job site. One of the employees, Louis Flores, was operating the pole saw. Mr. Flores was responsible for trimming the trees. The tree trimming was not completed that day. Another employee, Ricky Conch, was on the job site running the chipper.

On July 14, 2009, Kevin Hardy attempted to find out why the tree trimming had not been completed. Mr. Conch told Mr. Hardy that he did not know. When Mr. Hardy asked the claimant, the claimant said it was because Mr. Flores' arms were tired and that Mr. Conch knew this. An argument then ensued between the claimant and Mr. Hardy and included the use of

profanity. Mr. Conch got involved in the argument and reiterated that he did not know that Mr. Flores' arms were tired. The claimant called Mr. Conch an (f)ing liar.

The claimant then confronted Mr. Conch in the shop and told Mr. Conch that he (the claimant) was going to get Louie. Mr. Conch felt intimidated by the claimant's words and later reported to Mr. Hardy that he felt threatened as he did not know what the claimant and/or Mr. Flores might do to him.

The claimant went on to the job site along with Dale Schrage, another employee. Mr. Schrage was getting the chipper ready to go. The claimant started yelling at Mr. Schrage and complained about his treatment from the employer. He used "cuss words." Mr. Schrage got so upset that he decided to go home. He did not want to work around the claimant anymore. Mr. Schrage later told Mr. Hardy what happened after Mr. Hardy called to find out why Mr. Schrage was not at work.

Mr. Hardy had intended to give the claimant a written warning for his conduct that morning. When he made his initial decision he did not know about the confrontation between the claimant and Mr. Conch nor did he know what happened at the job site later that day with Mr. Schrage. When he found about these two incidents he made the decision to terminate the claimant for misconduct.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there is a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). Threats can constitute misconduct. In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1990) the Court of Appeals stated an employer has the right to expect decency and civility from its workers and that evidence of threats could be found both in words and body language.

The evidence in this case established that the claimant's relationship with Mr. Hardy was becoming increasingly tense. The claimant felt that he was going to be terminated because he filed a worker's compensation claim. Mr. Hardy denied that was the case and there is no evidence that the employer intended to take that action. When Mr. Hardy asked the claimant why the job had not been completed the previous day, an argument ensued between them. The claimant acknowledged that he did raise his voice and use profanity.

The administrative law judge has carefully considered all of the testimony in this case and has concluded that the employee has shown misconduct. Mr. Conch testified that he was called a "f...ing liar" and that the claimant's later statements in the shop intimidated him and caused him to worry about being harmed physically. Mr. Schrage was so disturbed by the claimant's comments on the job site that he left and did not come back. The claimant's actions towards these two co-employees are a breach of the duty of civility and decency owed the employer. Whatever difficulties there were between the claimant and Mr. Hardy does not excuse the claimant's treatment of his co-workers. Benefits are denied.

DECISION:

The decision of the representative dated August 11, 2009, reference 03, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs