

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARL NORMAN
Claimant

APPEAL NO. 09A-UI-10020-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLACK HAWK COUNTY
Employer

OC: 05/31/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Carl Norman filed a timely appeal from the July 7, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on August 7, 2009 and completed on August 14, 2009. Mr. Norman participated personally and was represented by attorney Michael McEnroe. Dave Mason, Assistant Black Hawk County Attorney, represented the employer and presented testimony through June Watkins, Human Resources Director for Black Hawk County, and Amy Landers, Director of the Black Hawk County Youth Shelter. Exhibits One through Seven and A through C were received into evidence.

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: Carl Norman was employed by Black Hawk County as a part-time Residential Counselor at the Black Hawk County Youth Shelter from July 2007 until July 1, 2009, when Dominic Peters, Program Supervisor, and Amy Landers, Director, discharged him from the employment. Mr. Peters and Ms. Landers were Mr. Norman's immediate supervisors.

The sole incident that prompted the discharge occurred on May 25, 2009. On that day, Mr. Norman was one of two staff supervising juveniles at the shelter. Resident Shane Truelove was a 17-year-old troubled young man with a history of self-injurious behavior and a history of unprovoked assault on shelter staff. On May 25, Mr. Truelove attacked Mr. Norman at the end of a disagreement about whether the young man had performed an assigned cleaning task and after Mr. Truelove refusing to go to his room for scheduled "quiet time." During the verbal exchange leading up to the assault, Mr. Truelove said he did not like the sound of Mr. Norman's voice and Mr. Norman responded that some people might not like Mr. Truelove's face. Mr. Truelove had a "gothic" appearance and sported multiple facial piercings. Mr. Norman's comment helped to escalate the situation. The comment was in violation of work rules that

required Mr. Norman to treat the young man with respect and was contrary to crisis intervention training the employer had provided to Mr. Norman.

Mr. Truelove commenced his assault of Mr. Norman by charging at Mr. Norman and hitting Mr. Norman in the face with sufficient force to split Mr. Norman's lip and to knock Mr. Norman's glasses off. Mr. Norman attempted to restrain Mr. Truelove, to stop him from further assaulting him. Mr. Truelove "went crazy" and scratched and bit Mr. Norman. Mr. Truelove grabbed hold of Mr. Norman's face and pressed his thumbs into Mr. Norman's eye sockets in an apparent effort to put out Mr. Norman's eyes. Mr. Norman responded in self-defense by choking Mr. Truelove until the young man released his thumbs from Mr. Norman's eyes. The young man continued to be violent. Residential Counselor Angela Marshall attempted to intervene to restrain the youth. The young man summarily assaulted Ms. Marshall by hitting her in the face and arms and Ms. Marshall backed off. Mr. Norman was eventually able to pin the youth to the floor to prevent him from further harming himself, Mr. Norman, other staff, or the other residents, who were present. Juvenile Detention officers were summoned and took the young man into custody. Mr. Norman had multiple injuries that required medical evaluation and treatment. Ms. Marshall also suffered injury.

The employer faulted Mr. Norman his contribution to escalating the conflict with the young man, for his failure to use de-escalation techniques that were part of his training, and for his conduct during the course of the physical altercation. On May 28, Ms. Landers suspended Mr. Norman pending the outcome of the employer's investigation and the outcome of a Department of Human Services investigation into the matter. Mr. Norman was initially suspended without pay for 14 days and then was suspended with pay until July 1, 2009, when the employer discharged him. On June 22, 2009, the Department of Human Services notified the employer that it had completed its investigation. June Watkins, Human Resources Director, then reviewed County work rules and concluded that Mr. Norman had engaged in conduct that subjected him to discharge from the employment.

Mr. Truelove was charged with assault and waived to adult court.

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). The weight of the evidence indicates that Mr. Norman was aware no later than May 28, 2009 that the May 25 incident could cost him his job. Thus, the current act requirement has been met.

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 weight of the evidence establishes that Mr. Norman was negligent in performing his duties on May 25, 2009, when he uttered one or more remarks that contributed to the escalation of the situation involving Mr. Truelove. In uttering the remark, Mr. Norman failed to follow his training and established work rules. This one incident of negligence would not constitute misconduct in connection with the employment that would disqualify Mr. Norman for unemployment insurance benefits.

The weight of the evidence fails to establish willful misconduct in connection with the actual altercation. The evidence indicates that Mr. Truelove assaulted Mr. Norman and continued his efforts to assault Mr. Norman and others until Mr. Norman was able to subdue him. There was no opportunity to retreat. The evidence indicates that Mr. Norman acted in self-defense and defense of at least three others who were at risk of being assaulted by Mr. Truelove. The evidence indicates that the situation unfolded very quickly. The evidence indicates that Mr. Norman reasonably concluded he was at risk of being blinded by Mr. Truelove. The evidence indicates that Mr. Norman reasonably concluded that he needed to act to protect others present. One would expect a person who had just been seriously assaulted to be upset and agitated and it was no surprise that the sheriff's office or the juvenile detention staff would arrive to find Mr. Norman in that state. It is clearly easier to second-guess the appropriateness

of Mr. Norman's actions after the fact than it would be to gauge what is an appropriate measured response at the time one is being assaulted by a person bent on causing serious harm.

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 administrative law judge notes that the employer has failed to present any testimony from persons present for the events that triggered Mr. Norman's discharge from the employment. The employer had the ability to present more direct and satisfactory evidence than was presented.

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

DECISION:

The Agency representative's July 7, 2009, 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