

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN M CROW

Claimant

APPEAL NO. 10A-UI-07077-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEERY BROTHERS INC

Employer

Original Claim: 04/18/10

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Brian Crow filed a timely appeal from the May 10, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 29, 2010. Mr. Crow participated. Jack Nolan of Employers' Unity represented the employer and presented testimony through Janet Walker, Clint Coleman, and Terry Mertens. Exhibits One through Six 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: Brian Crow was employed by Deery Brothers as a full-time auto detailer from December 2008 until April 15, 2010, when Janet Walker, Detail Manager, and Terry Mertens, General Manager, discharged him from the employment. Ms. Walker had become Mr. Crow's immediate supervisor approximately a few months prior to the end of Mr. Crow's employment.

The final incidents that prompted the discharge occurred on April 14 and 15, 2010. On April 14, Mr. Crow participated in a training session with other employees. Mr. Crow drew attention to another employee, Mark Baker, during the portion of the training that addressed buffing technique. Mr. Baker was upset about having attention drawn to him during the training. After the training session finished, Mr. Baker demanded that Mr. Crow give him back a compact disk he had lent to him. Mr. Crow inquired whether Mr. Baker was asking for the CD because Mr. Baker was mad at Mr. Crow. Mr. Crow, in reference to his comment during the training session, asserted that Mr. Baker did not want to learn. A verbal exchange continued. Mr. Crow used profanity, but it was common for detailing employees to use profanity. Mr. Baker escalated the incident by shoving Mr. Crow. Mr. Crow did not continue the physical exchange in any way and did not fight back. Another employee, Clint Coleman, stepped between the men to restrain Mr. Baker, who attempted to continue the assaultive behavior. Mr. Crow continued his comments about Mr. Baker not wanting to learn. Ms. Walker entered to find Mr. Coleman

breaking up what appeared to be a fight between Mr. Crow and Mr. Baker. Ms. Walker separated the two men, and briefly spoke to both. Ms. Walker suspended Mr. Baker and Mr. Crow for the day.

On April 15, Mr. Crow returned to work and Ms. Walker met with him to issue a reprimand concerning April 14. The written reprimand indicated that Mr. Crow had used inappropriate language. The reprimand also indicated that Mr. Crow had engaged in a physical altercation. Mr. Crow objected to Ms. Walker's directive that he sign the reprimand because it indicated that he had contributed to a physical altercation. Ms. Walker told Mr. Crow that he would be suspended for the April 14 incident and would be subject to further suspension if he did not sign the reprimand. Mr. Crow said, "We'll see about that." Based in part on her belief that Mr. Crow had been an active participant in the physical altercation the day before, rather than the victim of an assault, Ms. Walker interpreted Mr. Crow's comment as a threat. The comment was not a threat and had not been uttered in a manner and context that would lead a reasonable person to interpret it as a threat. Ms. Walker conferred with Mr. Mertens and then discharged Mr. Crow from the employment.

In making the decision to discharge Mr. Crow from the employment, the employer considered allegations from coworkers that Mr. Crow had had harsh words with a part-time employee earlier in the employment. Mr. Crow and that employee had contributed equally to that verbal dispute.

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).

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).

An employer has the right to expect decency and civility from its employees. Use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer’s request in light of the circumstances, along with the worker’s reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence fails to establish misconduct in connection with the employment that would disqualify Mr. Crow for unemployment insurance benefits. The evidence indicates that on April 14, 2010, Mr. Crow made an error in judgment when he drew attention to Mr. Baker during a training session. The evidence indicates that Mr. Crow and Mr. Baker then had a difference of

opinion that Mr. Baker alone escalated into a physical altercation. The evidence indicates that Mr. Crow used profanity before, during, and after the assault, but that use of profanity was commonplace amongst the detailing staff. The evidence indicates that Mr. Crow was the victim of an assault and did not engage in any fighting behavior in the workplace. The evidence indicates that the employer unreasonably requested that Mr. Crow admit to fighting in the workplace by signing the reprimand Ms. Walker had prepared. Mr. Crow reasonably refused to admit to fighting in the workplace. Ms. Walker either intentionally misinterpreted Mr. Crow's "We'll see about that" comment as a threat or erroneously interpreted the comment as a threat. The comment was not a threat, but was instead an indication that Mr. Crow intended to appeal to a higher member of management Ms. Walker's decision to suspend him.

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

DECISION:

The Agency representative's May 10, 2010, 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/kjw