

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIC MUTCHLER

Claimant

APPEAL NO. 16A-UI-13659-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BASS PRO OUTDOOR WORLD LLC
BASS PRO SHOPS OUTDOOR WORLD**
Employer

**OC: 11/20/16
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Eric Mutchler filed a timely appeal from the December 21, 2016, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an a claims deputy's conclusion that Mr. Mutchler had been discharged on November 18, 2016 for using profanity on the job. After due notice was issued, a hearing was held on January 18, 2017. Mr. Mutchler participated. Jasmine Cox represented the employer and presented additional testimony through Daniel Stout. Exhibits 1 through 4 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: Eric Mutchler was employed by Bass Pro Shops as a part-time line cook from August 2016 until November 19, 2016, when Jasmine Cox, Human Resources Manager, discharged him from the employment. Mr. Mutchler's immediate supervisors were Daniel Stout, Restaurant Manager, and Arlan Ellis, Restaurant General Manager. Until November 18, 2016, Mr. Mutchler's fiancée also worked for the employer.

The conduct that triggered the discharge is alleged to have occurred on November 18, 2016. Mr. Mutchler was not scheduled to work that day and did not work that day. Mr. Mutchler's fiancée, Shaelen, was scheduled to work at 10:30 a.m. that day. Mr. Mutchler and Shaelen arrived at the workplace at 11:30 a.m. Shaelen was late for work. While Mr. Mutchler waited in his car, he received a telephone call from Shaelen in which she told him that she had been discharged for tardiness. At that point, Mr. Mutchler went to the kitchen area of the restaurant and spoke with Mr. Stout. Mr. Stout confirmed that Shaelen had been discharged. Mr. Mutchler located Shaelen at the customer service desk. Jason Sabatka, Operations Support Lead, and Cassidy Stuart, Customer Service Team Lead, were at the customer service desk. They said that Shaelen needed to leave the workplace. Mr. Mutchler gave Shaelen his car keys and Shaelen went to the car. Mr. Mutchler did not immediately leave the workplace. Instead,

Mr. Mutchler went to the human resources office and spoke briefly with Ms. Cox. Mr. Mutchler wanted to discuss the employer's decision to discharge Shaelen. Ms. Cox declined to discuss that matter with Mr. Mutchler. Mr. Mutchler then left the human resources office. The meeting lasted no more than a minute. Mr. Mutchler did not do or say anything inappropriate during the meeting. Mr. Sabatka had followed Mr. Mutchler to the human resources office and then continued to follow Mr. Mutchler when he left the human resources office. Mr. Mutchler paused briefly in the vicinity of the customer service desk to face Mr. Sabatka. Cassidy Stuart, Customer Service Team Lead, subsequently asserted that Mr. Mutchler had uttered that statement "Fuck you motherfucker" during that brief pause. Ms. Stuart was located 25 to 30 feet from Mr. Mutchler. Mr. Sabatka was closer to Mr. Mutchler at the time of the purported utterance, but did hear the purported utterance. Mr. Mutchler denies that he made any such utterance. After the brief pause in the vicinity of the customer service desk, Mr. Mutchler continued to the kitchen area. When Mr. Mutchler reached the kitchen area, Mr. Stout concluded from Mr. Mutchler's demeanor that Mr. Mutchler was upset. Mr. Mutchler did not do or say anything inappropriate in the kitchen area. Mr. Stout asked Mr. Mutchler to leave the workplace and Mr. Mutchler complied.

After Mr. Mutchler left the workplace on November 18, 2016, Mr. Sabatka sent an email message to Ms. Cox at 12:58 p.m. in which Mr. Sabatka asserted that Ms. Stuart had heard Mr. Mutchler say "Fuck you motherfucker" in the vicinity of the customer service desk. At 1:14 p.m., Ms. Stuart sent an email message to Ms. Cox in which she asserted that when Mr. Mutchler had paused at the customer service area enroute to the kitchen he had said to Mr. Sabatka, "Fuck you motherfucker."

The employer's decision to discharge Mr. Mutchler on November 19, 2016 occurred in the context of a discussion that occurred during Mr. Mutchler's shift on November 17, 2016. On that day Mr. Stout, Ms. Cox, and Mr. Mutchler discussed Mr. Mutchler's chronic medical condition. In connection with that discussion, Ms. Cox and Mr. Stout reassigned Mr. Mutchler to work in a different area of the store for the remainder of his shift. Mr. Mutchler had not asked to be reassigned.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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). 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 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 employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to provide misconduct in connection with the employment by a preponderance of the evidence. The only person alleged to have heard the purported vulgar utterance was Ms. Stuart. The employer had the ability to present testimony through Ms. Stuart, but did not. The person to whom the alleged utterance was purportedly directed, Mr. Sabatka was present

at the time of the alleged utterance, but did not hear any such utterance. Immediately before and after the alleged utterance, Mr. Mutchler was in contact with members of management and did not say or do anything inappropriate. The employer has presented insufficient evidence to rebut Mr. Mutchler's testimony that he made no such utterance. The fact that the discharge followed the discussion regarding Mr. Mutchler's medical condition raises the question of whether the alleged utterance was merely pretext for the discharge, but does not answer that question.

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

DECISION:

The December 21, 2016, reference 03, 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/rvs