

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WILL B ROBINSON**  
Claimant

**APPEAL NO. 09A-UI-02549-E2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MERCY HOSPITAL**  
Employer

**OC: 01/11/09**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated February 9, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 7, 2009. Claimant participated personally and witnesses Annette Sydnor and Mike Yegge. Employer participated by Eddie Brown Human Resources Business Partner, Rochelle Beard, Food and Nutrition Supervisor, Doreen Richman and Grace Bloomquist. Exhibits One, pages 1- 16, was admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 13, 2009. He was discharged for a comment he made to a co-employee on December 22, 2008. The claimant worked in food service as a full-time cook and had been employed since March of 1999. The claimant and a co-worker, Amanda Pjanic, had a confrontation on December 22, 2008. Ms Pjanic shouted to the claimant, who was behind her, and the claimant responded that she should shut up and that he could or would kick her ass. This matter was reported to the claimant's supervisor, Rochelle Beard on December 22, 2008. Ms Beard talked to the claimant and Ms. Pjanic on that day. The claimant admitted he had spoken to Ms. Pjanic as described above. The employer has a policy prohibiting violence and threats of violence in the work place. The claimant received a copy of the policy.

## 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment

of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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).

In this case the conduct of the claimant came to the attention of a supervisor on December 22, 2008. She investigated the incident and confirmed what had taken place. The claimant worked his regular shifts until he was discharged on January 13, 2009, 23 days later. In Greene the court held that a discharge occurring seven days after the employer knew of the incident was a discharge for a current act. In this case we have a longer period of time. There did not appear to be any facts in dispute in this case. The employer did not offer any specific information as to why it took so long to discharge the claimant. It is true the incident took place in December, around Christmas, but that does not excuse such a long delay when the facts had been established. The claimant continued to work his shifts with the co-worker, Ms Pjanic. The employee's immediate supervisor apparently did not believe the claimant was a threat to the coworker. The employer did not fire the claimant for a current act of misconduct. Had the employer acted sooner they would likely have shown that the claimant committed a current act of misconduct. The employer did not act in a timely manner in this case and therefore the claimant was not discharged for a current act of misconduct. This decision does not condone the statements made by the claimant in this case. The employer in this case was justified under its policy to terminate the claimant. However, the claimant continued to work for the employer for over three weeks (23) days.

In this matter, the evidence fails to establish that claimant was discharged for a current act of misconduct.

**DECISION:**

The decision of the representative dated February 9, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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James Elliott  
Administrative Law Judge

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Decision Dated and Mailed

jfe/pjs