

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL L DEMORET
Claimant

APPEAL NO. 07A-UI-03824-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 03/18/07 R: 02
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Michael Demoret filed a timely appeal from the April 9, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 1, 2007. Mr. Demoret participated. Kaley McKenney, Production Operations Manager, represented the employer.

ISSUE:

Whether Mr. Demoret was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Demoret was employed by Wells Fargo Bank as a full-time Consumer Loan Underwriter from November 30, 2005 until March 19, 2007, when Production Operations Manager Kaley McKenney suspended him and then discharged him for offensive language and threatening conduct.

The final incident that prompted the discharge occurred on March 19, 2007. On the morning of March 19, a coworker, Diane Newbold, asked Mr. Demoret whether he was arriving late for work. Mr. Demoret's work schedule had recently changed and Mr. Demoret was in fact on time for work. Mr. Demoret told Ms. Newbold, "If the fucking management would get their heads out of their asses, then you would have known about the change before now." At the time of the exchange, Ms. Newbold was on the telephone with the Site Vice President, Kathy DeHaven, who overheard Mr. Demoret's remark. Shortly thereafter, Mr. Demoret went to Ms. McKenney's office to discuss problems he was having with logging onto the employer's computer network and concerns about his career. While Mr. Demoret was in Ms. McKenney's office, Ms. Newbold arrived and told Mr. Demoret that Ms. DeHaven wanted to speak with him on the telephone and that Mr. Demoret would need to take the call at Ms. Newbold's desk. Mr. Demoret took the phone call, during which Ms. DeHaven chastised Mr. Demoret for not being logged into the employer's telephone system to receive calls. After the telephone conversation ended, Mr. Demoret returned to Ms. McKenney's office. Ms. Newbold was still at Ms. McKenney's office and had been describing Mr. Demoret's earlier behavior to Ms. McKenney. Mr. Demoret

was visibly angry. Mr. Demoret began yelling and shaking his hand, in which he held some papers. Mr. Demoret said to Ms. McKenney: "If you want my fucking resignation, you can have it right now. The fucking bitch is on the phone yelling at me right now." Ms. McKenney attempted three times to get Mr. Demoret to calm down by calling his name. Mr. Demoret acknowledged that his conduct was inappropriate and returned to his desk. Ms. Newbold told Ms. McKenney that she was uncomfortable working in the same area with Mr. Demoret. Another employee had been heading towards Ms. McKenney's office at the time of Mr. Demoret's outburst and had left the area because of the outburst.

After Mr. Demoret's outburst, Ms. McKenney contacted the employer's human resources department, and the decision was made to send Mr. Demoret home for the day. Ms. McKenney summoned Mr. Demoret to a conference room and advised Mr. Demoret of the decision to send him home for the day. Mr. Demoret apologized for his prior conduct and mentioned that he had "an anger problem." Ms. McKenney had summoned security personnel to assist with escorting Mr. Demoret from the workplace.

Later that day, the employer decided to discharge Mr. Demoret for violating the employer's violence free workplace policy and professional conduct policy. Mr. Demoret was aware of both policies and had recently reviewed the code of conduct as part of his ongoing training. The violence free workplace policy prohibited threatening, violent, and or intimidating behavior as well as profane or abusive language. Ms. McKenney notified Mr. Demoret of the discharge on March 19.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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 greater weight of the evidence establishes that Mr. Demoret made all of the comments attributed to him. The comment uttered to Ms. Newbold about management was offensive and was directed at Mr. Demoret's superiors. It was not necessary that a manager actually hear the utterance, but the greater weight of the evidence indicates that Ms. DeHaven did in fact hear the comment. The comments Mr. Demoret subsequently uttered to Ms. McKenney about Ms. DeHaven were just as offensive as the first remark, but were specifically intended as an attack upon Ms. DeHaven's authority. Either one of the utterances established misconduct that disqualifies Mr. Demoret for unemployment insurance benefits. The evidence indicates that Mr. Demoret behaved in a threatening, intimidating manner at the time of the second utterance.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Demoret was discharged for misconduct. Accordingly, Mr. Demoret is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Demoret.

DECISION:

The claims representative's April 9, 2007, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times weekly benefit allowance, provided he meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs