

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RUSSELL L FLUGGE**

Claimant

**APPEAL NO. 14A-UI-00924-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WILD HORSE TRADING INC**

Employer

**OC: 12/29/13**

**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Russell Flugge filed a timely appeal from the January 17, 2014, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 19, 2014. Mr. Flugge participated personally and was represented by attorney Aaron Murphy. Mr. Murphy presented testimony through Mr. Flugge, and Ed Destenas. Brad Heagel represented the employer and presented additional testimony through Dave Anderson, Harley Deryter and Mike Anderson. Exhibit Two was 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: The employer operates a scrap metal business. Russell Flugge was employed as a full-time crane operator from 2010 until December 21, 2013, when Brad Heagel, President, discharged him from the employment. The incident that triggered the discharge occurred on December 21, 2013. On that day, Mr. Flugge used profane, offensive language to direct a coworker to complete a task. Mr. Flugge told the coworker, Harley Deryter, "Get your fucking ass out there and take those fucking rims off that blazer." Mr. Deryter reported the incident to Mr. Heagel. Mr. Heagel went to Mr. Flugge and asked what the problem was. Mr. Flugge indicated he had merely directed Mr. Deryter to perform the task. Mr. Flugge denied having done so in an offensive manner. Mr. Heagel then spoke to two other employees, who had witnessed the incident and who confirmed Mr. Deryter's story. Mr. Heagel again located Mr. Flugge, who was operating a crane. Mr. Heagel stood on the track of the crane, held onto both sides of the door to steady himself, leaned in and yelled at Mr. Flugge. Mr. Heagel used the same sort of offensive language toward Mr. Flugge that he understood Mr. Flugge had directed toward Mr. Deryter. Mr. Heagel did so to make that Mr. Flugge's treatment of the coworker was unacceptable. As Mr. Heagel was leaning in to speak with Mr. Flugge, Mr. Flugge head-butted Mr. Heagel and told Mr. Heagel, "Make my day." Mr. Heagel discharged Mr. Flugge on the spot and summoned another employee to take over the crane operating task.

## 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).

The weight of the evidence in the record establishes that Mr. Flugge was the aggressor in connection with the head-butting incident that triggered his discharge from the employment. Mr. Flugge's decision to use violence on that day was in willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. Mr. Flugge 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.

**DECISION:**

The agency representative's January 17, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs