

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEVAN L WHITE
Claimant

APPEAL NO. 12A-UI-11428-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP
Employer

OC: 09/02/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Devan White filed a timely appeal from the September 20, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 17, 2012. Mr. White participated personally and was represented by Brian Ulin, who also testified. Angie Stevens represented the employer. Exhibits One, Two, and Three 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: Devan White was employed by Cargill Meat Solutions Corporation as a full-time hog sorter from August 2011 until August 31, 2012, when Angie Stevens, human resources generalist, discharged him for directing offensive language and threatening conduct toward a supervisor. The incident that triggered the discharge occurred during Mr. White's last shift. At the time of the interaction between Mr. White and the supervisor, Monica Taylor was substituting for the supervisor who ordinarily supervised Mr. White's work area. Ms. Taylor was working the employees much harder than usual and was sorting the hogs in a manner different than the usual practice. Mr. White got angry with Ms. Taylor. Mr. White yelled at Ms. Taylor, "What the fuck, you are going to fucking run the cut floor out of hogs!" Mr. White was 15 feet away from Ms. Taylor at the time. Ms. Taylor reported the incident to Angie Stevens, human resources generalist, who conducted an investigation. As part of the investigation, Ms. Stevens questioned Mr. White. Mr. White admitted to being angry with Ms. Taylor and to yelling the comment attributed to him. The employer has a policy that prohibits any and all acts of violence and threats of violence. The employer had a separate policy that addressed offensive language. Mr. White was aware of both policies. The policies were set forth in the employee handbook.

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 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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

The employer has presented insufficient evidence, and insufficiently direct and substantial evidence, to prove misconduct in connection with the employment. The employer did not present testimony, or even a written statement, for anyone with first-hand, personal knowledge of the incident that triggered the discharge. The employer had the ability to present such testimony. The evidence establishes that Mr. White yelled offensive language at Ms. Taylor out of frustration with how hard she was working him and others and out of a bona fide belief that she was performing the work wrong. In other words, Mr. White uttered the comment as part of a misguided attempt to better serve the interests of the employer, not to act contrary to the interests of the employer. The weight of the evidence fails to support the assertion that Mr. White acted in a threatening manner toward Ms. Taylor. While the language was inappropriate, the language did not involve name-calling. Under the particular circumstances, the isolated use of offensive language did not rise to the level of misconduct that would disqualify Mr. White for unemployment insurance benefits.

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

DECISION:

The Agency representative's September 20, 2012, 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