

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANTHONY J SMITH**  
Claimant

**APPEAL NO. 12A-UI-10659-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LABOR READY MIDWEST INC**  
Employer

**OC: 07/01/12**  
**Claimant: Appellant (2-R)**

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

**STATEMENT OF THE CASE:**

Anthony Smith filed a timely appeal from the August 20, 2012, reference 01, decision that denied benefits in connection with a July 3, 2012 disciplinary suspension. After due notice was issued, a hearing was held on October 1, 2012. Mr. Smith participated. Carrie Anglin, Council Bluffs's branch manager, represented the employer.

**ISSUE:**

Whether the claimant was suspended or 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 is a temporary employment agency with branches in Council Bluffs and Omaha. Until July 1, 2012, Anthony Smith performed work for Labor Ready Midwest through the Council Bluffs branch. On that date, Mr. Smith performed work at a Menard's distribution center. Mr. Smith remarked to the supervisor there about another Labor Ready employee, Zelda, not performing satisfactorily. Later, after the day's work at the distribution center was complete, Mr. Smith, Zelda, and other Labor Ready employees returned to the Council Bluffs Labor Ready office to receive their pay. While Mr. Smith was waiting outside the Labor Ready office, Zelda aggressively made her way toward Mr. Smith. Zelda substantially outweighed Mr. Smith. Zelda called Mr. Smith several offensive names and then swung at Mr. Smith, scraping his nose. Mr. Smith, reflexively and in self-defense, pushed Zelda away from him, causing Zelda to fall. Later, Zelda and another female worker were assaulting one another and Mr. Smith stepped in to try to stop the fight. The employer suspended Mr. Smith for fighting in the employer's parking lot.

## 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 employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The employer has failed to present sufficient evidence, or sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment based on the July 1, 2012 parking lot incident. The employer failed to present testimony or even a written statement from a single person who witnessed firsthand the incident that prompted the employer to suspend Mr. Smith from the employment. The employer has failed to present a single witness with firsthand knowledge of the incident to rebut Mr. Smith's testimony that the female coworker assaulted him and that his action in response was limited to a reflexive or automatic act of pushing the female coworker away from him after she swung and hit him in the nose. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Smith was suspended for no disqualifying reason. Accordingly, Mr. Smith is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

The employer raised the question of whether Mr. Smith has met the work availability requirement since filing his claim for benefits. Specifically, the employer alleges that Mr. Smith has been working non-stop through the employer's Omaha branch since he was suspended from the Council Bluffs branch at the beginning of July 2012. This matter will be remanded to the Claims Division for determination of whether the claimant has met the availability requirements since establishing his claim for benefits.

#### **DECISION:**

The Agency representative's August 20, 2012, reference 01, decision is reversed. The claimant was suspended at the beginning of July 2012 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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