

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JERRY L THOMPSON JR**  
Claimant

**APPEAL NO. 10A-UI-07127-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FOODS INC**  
Employer

**Original Claim: 04/18/10  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Jerry Thompson filed a timely appeal from the May 12, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 1, 2010. Mr. Thompson participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

**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: Jerry Thompson was employed by Foods, Inc., doing business as Dahl's, as a full-time deli clerk from August 2009 until April 12, 2010, when Ryan Davis, Store Manager, discharged him upon the instructions of Jeff Hudson, Store Director. The incident that triggered the discharge occurred on April 12, 2010, when a process server attempted to service legal papers upon Mr. Thompson while he was working at the deli. Mr. Thompson told the person he was at work. Heather Gomez, Deli Supervisor, told the person he would need to leave the store. The process server became increasingly belligerent and intimidating. The process server threatened to go around the store telling people that he was at the store to serve eviction papers on Mr. Thompson. The process server threatened to tell the employer that Mr. Thompson should be fired. The process server referred to Mr. Thompson multiple times as "boy." Mr. Thompson is African-American. Mr. Thompson reasonably interpreted the "boy" comment as a racial slur. As the process server became more belligerent, more management staff became aware and involved in the incident. At one point, the process server pointed his finger at Mr. Thompson's face and had his finger less than an inch away from Mr. Thompson face. Mr. Thompson was in fear that the process server might poke him in the eye or somewhere else in the face and slapped the process server's hand away. Mr. Thompson did nothing else physical to process server. The managers eventually directed Mr. Thompson to go to the back of the store. Mr. Thompson complied. The store management persuaded the process server to go to the front of the store and leave. At that time Ryan Davis, Store Manager, notified Mr. Thompson he was discharged from the

employment, telling him it was for violating the employer's zero tolerance policy with regard to fighting.

### **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).

The employer has failed to appear for the hearing and has thereby failed to present any evidence to establish misconduct in connection with the employment. The weight of the evidence in the record fails to establish misconduct in connection with the employment. The evidence indicates that Mr. Thompson could likely have avoided the bad experience on April 12, 2010 by simply accepting the process papers the process server wanted to serve on him. Nonetheless, Mr. Thompson cannot be held responsible for the ensuing belligerent and aggressive behavior of the process server. The weight of the evidence indicates that Mr. Thompson was subjected to comments a reasonable person would interpret as racist. At the same time, the process server was behaving in a physically intimidating manner. When the process server placed his finger in the immediate vicinity of Mr. Thompson's face, Mr. Thompson reasonably concluded he was in immediate risk of harm and responded in self-defense by slapping the process server's hand away. Mr. Thompson did not continue or escalate the physical dispute after that one self-defensive slap.

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

**DECISION:**

The Agency representative's May 12, 2010, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw