

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KEVIN W KENEALY**  
Claimant

**APPEAL NO. 14A-UI-08983-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCE SERVICES INC**  
Employer

**OC: 05/04/14**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 27, 2014, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on August 4, 2014, for no disqualifying reason. After due notice was issued, a hearing was held on September 16, 2014. Claimant Kevin Kenealy participated. Michael Payne represented the employer and presented additional testimony through Taylor Henderson. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim for benefits that was effective May 4, 2014.

**ISSUE:**

Whether the claimant separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Advance Services, Inc., ASI, is a temporary employment agency. Kevin Kenealy most recently performed work for ASI in a temporary work assignment at Moeckly, an awning fabrication business. Mr. Kenealy began the assignment on June 3, 2014 and last performed work in the assignment on July 31, 2014. The work involved welding, grinding and cutting metal. Mr. Kenealy's immediate supervisor in the assignment was Ike Moeckly, the business owner. The assignment was supposed to be full-time, but did not provide full-time hours. On July 31, 2014, Mr. Kenealy went to the ASI office in Ames to express his frustration with the lack of full-time hours and his frustration with Mr. Moeckly as a supervisor. Mr. Kenealy thought that Mr. Moeckly was too particular about the work Mr. Kenealy performed and too quick to step in and make minor alterations to the work as Mr. Kenealy performed it. Mr. Moeckly had recently contacted ASI to authorize a raise for Mr. Kenealy. When Mr. Kenealy arrived at the ASI office in Ames, he acted belligerent. Mr. Kenealy demanded that the raise that had recently been authorized by Mr. Moeckly be removed from his pay. The ASI representative, Taylor Henderson, told Mr. Kenealy that ASI would first need to check with Mr. Moeckly, ASI's client,

before removing the raise that Mr. Moeckly had authorized. Ms. Henderson's response did not satisfy Mr. Kenealy, who continued to be belligerent. Mr. Kenealy told Ms. Henderson that he needed a different assignment. Mr. Kenealy threatened to punch Mr. Moeckly in the face if he did not get another assignment. When Mr. Kenealy continued to be belligerent in his dealings with Ms. Henderson, Stan Kreutzer, ASI International Regional Manager, joined the conversation and told Mr. Kenealy to stop making demands. Mr. Kenealy got up and walked out. When Mr. Kenealy next reported for work at Moeckly, Mr. Moeckly told Mr. Kenealy that ASI had ended the assignment and was placing Mr. Kenealy in another assignment. Mr. Kenealy then telephoned ASI and spoke to a representative who told him he was discharged from the employment.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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) alone. 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).

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 evidence in the record establishes that Mr. Kenealy threatened to punch Mr. Moeckly in the face during Mr. Kenealy's belligerent rant at ASI on July 31, 2014. Whatever Mr. Kenealy's concerns with the assignment might have been, the threatening statement was sufficient to establish misconduct in connection with the employment that would disqualify Mr. Kenealy for unemployment insurance benefits. It was not necessary for Mr. Moeckly to be present at the time of the threat. It was not necessary for the employer to wait until Mr. Kenealy act on the threat before the employer took action. Effective July 31, 2014, Mr. Kenealy 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.

Because no benefits have been paid in connection with the claim that was effective May 4, 2014, there is no overpayment of benefits to address.

**DECISION:**

The claims deputy's August 7, 2014, reference 02, decision is reversed. The claimant was discharged for misconduct. Effective July 31, 2014, 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 will not be charged for benefits paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs