

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROY A SHAW**  
Claimant

**APPEAL NO. 15A-UI-01533-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXCELL MARKETING LC**  
Employer

**OC: 01/11/15**  
**Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 30, 2015, reference 01, 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 was discharged for no disqualifying reason.. After due notice was issued, a hearing was held on April 23, 2015. Claimant Roy Shaw did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. David Diehl represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence. The administrative law judge took official notice of the fact-finding materials.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as head receiver/shipper from 2010 until January 15, 2015, when the employer discharged the claimant for violence in the workplace and for a positive breath alcohol test. Upon his arrival at the workplace on January 15, the claimant confronted a female employee whom the claimant had previously dated. The claimant knocked the female employee's coffee out of her hand and pulled her hair. The claimant's supervisor summoned him to a meeting during which the claimant used highly offensive and vulgar language. Based on the claimant's outrageous behavior, which the employer deemed out of character for the

claimant, the employer suspected that the claimant might be under the influence of alcohol or drugs. Employer requested that the claimant submit to drug and alcohol testing and the claimant complied. The drug test was negative. The alcohol test returned an initial result .089 gram of alcohol per 210 Liters of breath and a second result of .083.

The employer has the written drug-free workplace policy. The employer had provided the policy to the claimant. The policy calls for reasonable suspicion drug and alcohol testing. The employer's policy deems an alcohol concentration of .04 grams of alcohol per 210 Liters of breath to be a positive breath alcohol test. The employer's policy listed the controlled substances for which the employer would screen. The employer's policy provided that a positive drug or alcohol test would result in discharge from the employment. However, the employer's policy provided that an employee who had not previously violated the alcohol policy would be offered rehabilitation in lieu of discharge. The supervisor requested that the claimant submit to drug and alcohol testing and not recently participated in training concerning drug and alcohol testing are discerning whether someone was under the influence of alcohol or drugs. The supervisor's most recent training had occurred for years prior to the claimant's drug and alcohol test. The employer did not offer the claimant rehabilitation upon the claimant's first positive alcohol test. The employer was aware that the claimant had a prior OWI conviction. The employer deemed the claimant to be an unacceptable safety risk.

At the same time the employer investigated the January 15 act of violence, the employer received new information from the female coworker regarding a prior offensive act that the claimant had directed at the female coworker on December 30, 2014. In that prior instance, the employer received reports from other employees that the claimant had spat in the female coworker's face. The female coworker had at the time denied the conduct had taken place, but after the incident on January 15, female coworker told the employer the claimant had indeed spat in her face on December 30.

The claimant established a claim for unemployment insurance benefits that was effective January 11, 2015 and received \$416.00 in benefits for the week ending January 31, 2015.

The employer participated in the January 29, 2015 fact-finding interview.

#### **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.

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). 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).

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide a basis to render an employee ineligible for unemployment compensation benefits."

The claimant's positive alcohol test did not constitute misconduct in connection with the employment. The employer's written policy complied with the requirements of the statute. The claimant's abnormal/erratic behavior provided a reasonable basis for the request that he submit to drug and alcohol testing. However, the supervisor involved in requesting the drug and alcohol testing did not have the training required by the statute. See Iowa Code section 730.5(9)(h). In addition, the employer did not follow its own policy in connection with the positive alcohol test insofar as the employer did not offer the claimant rehabilitation in lieu of

discharge upon the claimant's first violation of the policy. For these reasons, the positive alcohol test cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits.

The claimant's violent and belligerent conduct is a different story. 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 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 evidence in the record establishes that the claimant assaulted the female coworker on January 15, 2015. That conduct by itself was sufficient to establish his conduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits. The weight of the evidence establishes that the January 15 incident represented the second time the claimant had assaulted the same coworker.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for misconduct. Accordingly, claimant 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 unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$416.00 in benefits for the week ending January 31, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

**DECISION:**

The January 30, 2015, reference 01, decision is reversed. 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 claimant was overpaid \$416.00 in benefits for the week ending January 31, 2015. The claimant must repay the benefits. The employer's account is relieved of liability for benefits paid to the claimant, including liability for benefits already paid.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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