

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

UT V PHAM
Claimant

APPEAL NO. 12A-UI-09573-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WINEGARDNER & HAMMONS
Employer

OC: 06/24/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Ut Pham filed a timely appeal from the July 26, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 12, 2012. Mr. Pham participated. Madonna Kooistra represented the employer and presented additional testimony through Steve DeGroot. Vietnamese-English interpreter Phung Nguyen assisted with the hearing. The hearing in this matter was consolidated with Appeal Number 12A-UI-09574-JTT. Exhibits 1, 2, 3, and 6 through 12 were received into evidence. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant.

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: Ut Pham was employed by Winegardner & Hammons, doing business as the Cedar Rapids Marriott, as a full-time dishwasher from 2009 until June 21, 2012, when Steve Muller, food and beverage director, discharged him for uttering threats of violence in the workplace on June 20 and June 21, 2012. On June 20, Mr. Pham went to Madonna Kooistra, human resources manager, with a question about his pay. Mr. Pham speaks limited English. Mr. Pham's primary language is Vietnamese. On June 20, Ms. Kooistra attempted, unsuccessfully, to secure an interpreter so that she could address Mr. Pham's concern. When Ms. Kooistra was unable to get the interpreter on the line, Mr. Pham told Ms. Kooistra repeatedly, "You're no good." Mr. Pham raised his voice and threw an envelope on Ms. Kooistra's desk. Mr. Pham said, "Fuck you, you're no good." Mr. Pham was very agitated. Mr. Pham told Ms. Kooistra, "I will kill you." Mr. Pham then positioned his arms as if he was holding a rifle. Mr. Pham again stated, "I will kill you," and then left Ms. Kooistra's office.

On June 21, Ms. Kooistra, Steve Degroot, executive chef, Mr. Mullen, and an interpreter met with Mr. Pham to discuss what had occurred the previous day. Mr. Pham again became agitated. Mr. Pham started beating his chest. Through the interpreter, Mr. Pham said that he

was angry and that if he died, everyone would die. The interpreter attempted to redirect Mr. Pham. Mr. Mullen acknowledged that Mr. Pham was a hard worker, but stated that the profanity-laced threats and hostile behavior were of serious concern. The employer then sent Mr. Pham home for the day. The employer then discharged Mr. Pham from the employment based on a zero tolerance policy concerning threats in the workplace.

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).

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 misconduct in connection with the employment based on the offensive language and serious threats Mr. Pham directed toward Ms. Kooistra on June 20, 2012. The evidence also establishes misconduct in connection with the employment based on the additional threat Mr. Pham directed to all present for the meeting on June 21, 2012. Mr. Pham 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 paid to Mr. Pham.

DECISION:

The Agency representative's July 26, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw