

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KALVIN J DECOSTER
Claimant

APPEAL NO. 120-UI-05659-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUSTOM-PAK INC – LP2
Employer

OC: 01/22/12
Claimant: Appellant (1-R)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge based on the Employment Appeal Board remand for a new hearing after the employer had been denied opportunity to participate in an earlier appeal hearing. Claimant Calvin Decoster had filed a timely appeal from the February 28, 2012, reference 01, decision that denied benefits. After due notice was issued, the new appeal hearing was held on June 12, 2012. Mr. Decoster participated and presented additional testimony through Jennifer Perryman. Andrea Lawrence represented the employer and presented additional testimony through Don Kingery and Lonnie Adrian.

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: Calvin Decoster was employed by Custom-Pak, Inc. as a full-time machine operator from 2010 until January 24, 2012, when the employer discharged him from the employment. Mr. Decoster worked the 3:00 p.m.-to-11:20 p.m. shift.

The final incident that triggered the discharge occurred as Mr. Decoster was leaving the workplace at the end of his shift on January 20, 2012. Mr. Decoster had a running disagreement with coworker Jayson Wing. Mr. Wing had been corresponding with Mr. Decoster's girlfriend, Jennifer Perryman. During the shift on January 20, Mr. Decoster and Mr. Wing exchanged antagonistic text messages. Mr. Decoster's text messages to Mr. Wing included one in which he wrote: "Keep your lips moving, pussy. I'll find you after work." Mr. Decoster contacted Ms. Perryman and Ms. Perryman in turn contacted Mr. Decoster's brother, Kyle Decoster. Kyle Decoster went to Calvin Decoster's workplace armed with a baseball bat. Calvin Decoster announced to other employees his intention to beat up Mr. Wing.

Mr. Wing was riding home with coworker John Matusewich that evening. At the end of the shift, Mr. Wing and Mr. Matusewich made their way to Mr. Matusewich's car. They entered the car

and began to leave. Calvin Decoster stepped in front of the car to prevent them from leaving. Calvin Decoster then made his way to the passenger side of the car and commenced yelling at Mr. Wing. Mr. Wing was able to get the passenger side door locked before Calvin Decoster could open it. Calvin Decoster nonetheless tried unsuccessfully to force the passenger door open so that he could assault Mr. Wing. Calvin Decoster caused damage to the passenger side door in the process.

Kyle Decoster had come to the workplace parking area to assist Calvin Decoster in confronting and threatening Mr. Wing. Kyle Decoster blocked Mr. Matusewich's vehicle from leaving by parking his vehicle in the roadway, blocking their exit. Kyle Decoster then approached the driver's side of Mr. Matusewich's car at the same time Calvin Decoster approached the passenger side. Kyle Decoster was wielding a baseball bat and was wearing a ski mask. Mr. Matusewich was not able to lock the driver side door before Kyle Decoster opened the door and started assaulting Mr. Matusewich. Kyle Decoster shoved Mr. Matusewich's face into the steering wheel. Kyle Decoster then began to assault Mr. Wing. Calvin Decoster was an active participant in the assault and was able to smack Mr. Wing in the face at least once. Ms. Perryman was nearby observing the incident. Several other employees were leaving work at the same time and saw the assault unfold. The fight broke up when a bystander yelled that they were calling the police. At least two of those employees re-entered the workplace to alert Don Kingery, second shift coach (supervisor), to the incident. The fight had broken up by the time Mr. Kingery got to the scene. Calvin Decoster met up with his brother a short while later.

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).

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 weight of the evidence establishes that Calvin Decoster was a willing and active participant in the assaults that took place on January 20. The weight of the evidence indicates that Calvin Decoster and Kyle Decoster coordinated an attack on Mr. Wing. Calvin Decoster provided testimony that was largely lacking in credibility. Mr. Decoster’s explanation of why he happened to be at the scene of the assaults does not make sense and is not credible. Mr. Decoster would have the administrative law judge believe that he was in fear of being assaulted by Mr. Wing, and *for that reason*, sought out Mr. Wing at the end of the shift on January 20. Mr. Decoster would have the administrative law judge believe that his brother just happened to show up armed with a baseball bat, completely unbeknownst to Mr. Decoster, and that it was pure circumstance that they just happened to arrive at the scene and approach the victims’ car at the same time. Mr. Decoster provided inconsistent statements about his involvement in the assault. The weight of the evidence indicates that Calvin Decoster planned an assault on Mr. Wing, that he enlisted his brother to back him up, and that he invited Ms. Perryman to come watch.

Kalvin’s Decoster’s assaultive behavior was directed at a coworker, was timed to occur at the end of the shift, and occurred either on the employer’s property or immediately adjacent to the employer’s property. The conduct was misconduct *in connection with the employment*.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Decoster was discharged for misconduct. Accordingly, Mr. Decoster 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. Decoster.

This matter is remanded for entry of an overpayment decision concerning any benefits the claimant has received in connection with the claim.

DECISION:

The Agency representative's February 28, 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 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.

This matter is remanded for entry of an overpayment decision concerning any benefits the claimant has received in connection with the claim.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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