

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES I MERFELD

Claimant

APPEAL NO. 10A-UI-17395-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR COOPERATIVE

Employer

OC: 10/10/10

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 14, 2010 (reference 01) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on February 1, 2011. Claimant participated with his spouse Marilyn Merfeld and was represented by Dylan Thomas, Attorney at Law. Employer participated through Human Resources Manager Laura Schwickerath, Ron Pumphrey, driver for a contract business Mark Stevens, Dar Avery, and independent farmer Kevin Olson and was represented by Ralph Smith, Attorney at Law. Claimant's Exhibit A was admitted to the record. Employer's Exhibit 1 was admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked part time as a general laborer/truck driver from September 27, 2008 and was separated from employment on October 9, 2010. On October 8, 2010 Stevens was in his truck waiting in the vehicle to unload at the elevator. Claimant, apparently not noticing him in line, drove around Stevens as he was waiting to give space to another truck to leave. Independent farmer Olson does not know Stevens or claimant. While at the employer business premises dumping corn from his truck, he observed Stevens and claimant get out of their trucks and meet chest-to-chest. He was surprised when he saw them back up, put up their fists, and start fighting. He saw claimant go back to his semi and get the crank handle out and go after Stevens. At that point they went out of his line of vision but he saw claimant, with blood on his head, look for something on the gravel near the crank. He saw Stevens getting into his semi about the same time. He went into the office door and saw claimant walk in and say, "If you don't fire that fucker, I'm going to kill him."

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct.

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.

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.

Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. EAB*, 529 N.W.2d 640 (Iowa App. 1995).

Employers generally have an interest in protecting the safety of all of its employees and invitees. Claimant's response to Olson by turning back to the cab and retrieving the crank handle and returning to Olson rather than using that opportunity to get back into the cab was not indicative of acting in self-defense when there was no retreat available and calls claimant's credibility into question about other aspects of the encounter. Claimant's reengagement of Olson violated employer's expectations of reasonable behavior and commonly known acceptable standards of work behavior. Benefits are denied.

DECISION:

The December 14, 2010 (reference 01) decision is affirmed. The claimant was discharged from employment for reasons related to job misconduct. Benefits are withheld until such time as the claimant works in and has been paid for wages equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css