

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIC A VANDER LINDEN
Claimant

APPEAL NO. 07A-UI-06829-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STEVENS CONCRETE LTD
Employer

**OC: 06/17/07 R: 03
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Eric Vander Linden filed an appeal from a representative's decision dated July 5, 2007, reference 01, which denied benefits based on his separation from Stevens Concrete, Ltd. After due notice was issued, a hearing was held by telephone on July 30, 2007. Mr. Vander Linden participated personally. The employer participated by Wendy Wolver, Office Manager.

ISSUE:

At issue in this matter is whether Mr. Vander Linden was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Vander Linden was employed by Stevens Concrete, Ltd. from July 13, 2006 until June 19, 2007 as a full-time laborer. On June 11, he was struck by a coworker, Salvador Suarez. Mr. Suarez approached him from behind and, when Mr. Vander Linden turned around, Mr. Suarez punched him in the face. According to witnesses, Mr. Vander Linden did not fight back but attempted to prevent Mr. Suarez from hitting him again. The altercation was eventually broken up by a foreman. The punch caused Mr. Vander Linden to suffer a split lip that required a plastic surgeon.

Mr. Vander Linden did not have a history of fighting on the job. Both he and Mr. Suarez were discharged as a result of the June 11 incident. The employer believed Mr. Vander Linden played a part in instigating the June 11 fight based on prior incidents with Mr. Suarez. Approximately three weeks before the fight, the two exchanged words because Mr. Suarez did not like the manner in which Mr. Vander Linden was moving rocks with the skid loader. After work on June 7, Mr. Vander Linden and a coworker were driving past Mr. Suarez, who was riding his bicycle. They pulled the vehicle up next to Mr. Suarez and Mr. Vander Linden reached out the window and swatted Mr. Suarez on the back. Their next contact was on June 11.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The decision to discharge Mr. Vander Linden was prompted by the altercation of June 11. He was not the aggressor in the altercation. The employer acknowledged that he was blindsided by Mr. Suarez and that he did not fight back during the altercation.

According to the employer, Mr. Vander Linden was discharged because of his actions leading up to the fight. The incident with the skid loader occurred three weeks before the fight. Certainly a foreman would have been aware if Mr. Vander Linden was engaging in adverse conduct on the job site. Since he had not received any verbal or written warnings, the administrative law judge must assume that there had been no issues of misconduct between Mr. Vander Linden and Mr. Suarez on the job site. The evidence established that Mr. Vander Linden did reach out of a vehicle and swat Mr. Suarez on the back four days before the fight. Although his actions constituted horseplay, it was during his off-duty time. Therefore, he did not violate the employer's policy prohibiting horseplay on the job. The evidence failed to establish any other conduct on Mr. Vander Linden's part that may have caused Mr. Suarez to strike him on June 11. Although Mr. Vander Linden used poor judgment in swatting Mr. Suarez, it was not the type of conduct for which one would expect to be punched in the face over.

After considering all of the evidence and the contentions of the parties, the administrative law judge concludes that the employer has failed to satisfy its burden of proving that Mr. Vander Linden was discharged for misconduct. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). For the reasons cited herein, benefits are allowed.

DECISION:

The representative's decision dated July 5, 2007, reference 01, is hereby reversed. Mr. Vander Linden was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs