

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES W COOK
Claimant

APPEAL NO. 17A-UI-11828-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEI EQUIPMENT COMPANY INC
Employer

OC: 10/22/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

James Cook filed a timely appeal from the November 8, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Cook was discharged on October 20, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on December 7, 2017. Mr. Cook participated and presented additional testimony through Gary Schmuecker and Jim Mitchell. Daniel McDowell represented the employer and presented additional testimony through Kim Hurlbert, Kevin Dye and Bob Graesser. Exhibits A, B and C were received into evidence.

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: James "Jimmy" Cook was employed by CEI Equipment Company, Inc., as a full-time welder from 2010 until October 20, 2017, when Daniel McDowell, Managing Partner, discharged Mr. Cook from the employment. The sole incident that factored in the discharge occurred on October 19, 2017 in the employee break room during the morning break. Mr. Cook entered the break room, sat down next to coworker Gary Schmuecker, held a utility/box cutting knife to Mr. Schmuecker's throat with the back of the blade against Mr. Schmuecker's throat, and uttered a threat concerning Mr. Schmuecker sharing Mr. Cook's candy with another coworker. Mr. Cook intended the conduct as horseplay. Most of the employees present at the time of the incident, including Mr. Schmuecker, interpreted Mr. Cook's conduct as horseplay. A new employee, Kevin Dye, was unfamiliar with Mr. Cook, perceived the conduct as a credible threat. As the event was occurring, Mr. Dye contemplated tackling Mr. Cook. Immediately following the conduct, Mr. Dye directed Mr. Cook not to do it again. Mr. Dye was deeply upset by the conduct

and reported the conduct to Kim Hurlbert, Manager of Accounting and Human Resources. The employer's written workplace violation prevention policy prohibits any act or threat of violence in connection with the employment. Mr. Cook was aware of the policy. The employer investigated the October 19 incident by speaking with the employees involved with or present for the incident, including Mr. Cook. The employer suspended Mr. Cook on October 19, 2017 and discharged Mr. Cook on October 20, 2017 after concluding the investigation.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness’s appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness’s interest in the trial, their motive, candor, bias and prejudice. *Id.*

The administrative law judge notes that Mr. Cook’s case was not at all helped by Mr. Cook’s decision to engage in a ruse about a need for letters of reference to obtain from Mr. Schmuecker and Mr. Mitchell written statements that discounted the seriousness of Mr. Cook’s conduct.

Regardless of whether Mr. Cook intended a credible threat or intended to give the appearance of a threat as horseplay, Mr. Cook’s conduct on October 19, 2017 constituted misconduct in connection with the employment. Mr. Cook’s conduct violated the employer’s policy against violence. Mr. Cook’s intentional conduct placed at least one employee in fear for his safety and the safety of others. Mr. Cook’s use of a utility/box cutter knife as part of the conduct created a risk of harm, regardless of whether Mr. Cook intended a bona fide threat or horseplay. Regardless of whether Mr. Cook intended a credible threat or intended to give the appearance of a threat as horseplay, Mr. Cook’s conduct on October 19, 2017 demonstrated an intentional and substantial disregard of the employer’s interests in maintaining a safe and civil workplace. Mr. Cook is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Cook must meet all other eligibility requirements. The employer’s account shall not be charged for benefits.

DECISION:

The November 8, 2017, reference 01, decision is affirmed. The claimant was discharged on October 20, 2017 for misconduct in connection with the employment. 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. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs