

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JARED P CLEMONS
Claimant

APPEAL NO. 07A-UI-02938-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LENNOX MFG INC
Employer

OC: 02/11/07 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Lennox Manufacturing filed a timely appeal from the March 16, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 9, 2007. Claimant Jared Clemons participated. Sandra Holubar, Human Resources Support, represented the employer. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant and received Employer's Exhibits One through Four 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: Jared Clemons was employed by Lennox Manufacturing from April 26, 2002 until February 12, 2007, when his immediate supervisor, "Coach" Dave Cleland, indefinitely "suspended" him from the employment. Mr. Clemons continues under the so-called suspension as of the unemployment insurance appeal hearing on April 9, 2007, approximately two months after the suspension began.

The final incidents that prompted the indefinite "suspension" are alleged to have occurred on February 12, 2007. The employer alleges that Mr. Clemons intentionally intimidated a female coworker and then made a threatening remark directed at the coworker during an investigation. The employer representative, and only witness at the appeal hearing, lacked any personal knowledge concerning the final incident or any prior incidents. Though all of the six to eight individuals involved in the events of February 12 continue to work for Lennox Manufacturing, the employer did not present testimony from any of those individuals. Instead, the employer submitted a written "transcript" of uncertain authorship and accuracy. The claimant denies knowledge of any act or intent to intimidate the female coworker. The claimant denies making several of the statements attributed to him in the "transcript," including the threatening remark attributed to him.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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).

Though the employer could elect to reinstate Mr. Clemons to the employment with his seniority intact, the greater weight of the evidence indicates that the employer discharged Mr. Clemons on February 12. When an "indefinite suspension" lasts two months, it becomes indistinguishable from a discharge. For purposes of determining Mr. Clemons' eligibility for benefits based on the February 12 separation, it makes no difference whether the employer called the separation a suspension or discharge. See 871 IAC 24.32(9). The employer has wholly failed to present readily available direct and satisfactory evidence to support its allegations of misconduct. Accordingly, misconduct is not established. See 871 IAC 24.32(4). Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Clemons was suspended and/or discharged for no disqualifying reason. Accordingly, Mr. Clemons is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Clemons.

In the event the employer elects to reinstate Mr. Clemons and/or take further action to "formally" discharge Mr. Clemons from the employment, the events of February 12, 2007 no longer constitute a "current act" of misconduct at this late date. See 871 IAC 24.32(8).

DECISION:

The Agency representative's March 16, 2007, reference 01, decision is affirmed. The claimant was suspended and/or discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw