

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW LOGAN

Claimant

APPEAL NO. 18A-UI-09550-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 08/26/18

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Andrew Logan filed a timely appeal from the September 13, 2018, 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. Logan was discharged on August 23, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on October 2, 2018. Mr. Logan participated personally and was represented by Brian Ulin of UFCW Local 230. Rogelio Bahena represented the employer. Exhibits A through I 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: Andrew Logan was employed by Swift Pork Company, a/k/a JBS, as a full-time sanitation worker from March 2017 until September 4, 2018, when Rogelio Bahena, Human Resources Generalist, discharged him from the employment for alleged threatening utterances and behavior in connection with an incident on August 23, 2018. Mr. Logan's usual duties included production support duties outside of his primary sanitation duties. Ms. Logan's usual work hours were 10:00 p.m. to 6:35 a.m., Monday evening through Saturday morning. Mr. Logan was also required to work a Saturday to Sunday overnight shift as needed. Production Supervisor Araley Gonzalez was Mr. Logan's immediate supervisor. On August 9, 2018, Mr. Logan's brother was murdered. On Friday, August 17, 2018, Mr. Logan attended his brother's funeral. Mr. Logan returned to work on the evening of August 22, 2018, despite feeling distraught over the loss of his brother. Mr. Logan told Ms. Gonzalez and human resources representative Jacqueline Baez that he was not okay, but that he knew he could not take any more time off in light of his attendance points.

On the evening of Thursday, August 23, Mr. Logan reported for his second shift following his brother's funeral. Mr. Logan was still distraught over the sudden loss of his brother and again

told the employer he was not okay. At about 11:30 p.m., Mr. Logan was outside the plant looking for a forklift when he received a message on his cell phone. Because Mr. Logan's duties took him to all areas of the plant, Mr. Logan was allowed to keep his cell phone on his person during work hours for the purpose of communicating with his supervisor. When Mr. Logan reviewed what he thought would be a message from his supervisor, he saw what he had actually received was a message from his sister-in-law that included a photo of Mr. Logan and his brother. Mr. Logan was upset and looking at this photo when Christopher Frushon, Maintenance General Foreman, approached and told him, "Put the fucking cell phone away please." Mr. Logan was not in his right mind and responded poorly to being addressed in such a manner. As Mr. Logan walked away, Mr. Logan provided a flip response, "Put *your* fucking cell phone away." Mr. Logan decided that he needed to leave the workplace and headed toward the employee parking lot. As Mr. Logan walked in the darkened parking lot, Mr. Frushon followed behind. Mr. Frushon then enlisted other supervisors to follow Mr. Logan. Mr. Logan felt in the moment that he was being hunted and cornered. Mr. Logan yelled that he was leaving and to stop following him. As the supervisors approached, Mr. Logan turned and said, "Could you fucking quit following me. I'm leaving. Just leave me alone." At one point, Mr. Logan turned, moved toward the men who were following him, and said he was going to knock someone out. As Mr. Logan made his way to his car, he passed near security personnel and the guard shack, but the security personnel did not intervene. As Mr. Logan arrived at his car, one of the supervisors recognized him. At about that time, a production manager asked the men who were following Mr. Logan "what the fuck" they were doing and called them back to the building. Unbeknownst to Mr. Logan, the employer had summoned law enforcement, but local law enforcement officers were delayed due to another matter.

When Mr. Logan got to his car, he was feeling suicidal. Recognizing that he was a danger to himself, Mr. Logan drove to an emergency room and voluntarily committed himself for in-patient psychiatric treatment. Mr. Logan remained hospitalized until Monday, August 27.

On August 27, Rogelio Bahena, Human Resources Generalist, spoke with Mr. Logan by telephone. Brian Ulin, a union steward representing United Food and Commercial Workers Local 230, was also on the call. Mr. Bahena questioned Mr. Logan about the August 23 incident. Mr. Logan explained that he was depressed as he looked at the photo of his brother and that his brother has just been shot and killed in Chicago. Mr. Logan explained that actions arose from his depression, that he had been outside looking for a forklift, that he had not been on break, and that once Mr. Frushon confronted him, he was focused on trying to get away from the situation. Mr. Logan explained that he had checked himself into the hospital due to his depression. Mr. Bahena stated he would investigate and get back to Mr. Logan. Mr. Bahena collected written statements from Mr. Frushon and others who had followed Mr. Logan on August 23. On September 4, Mr. Bahena notified Mr. Logan that he was discharged from the employment.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct.

App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418 (Iowa Ct. App. 1989).

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 circumstances that led to Mr. Logan's suspension and discharge from the employment distinguish this case from other situations and from the above referenced cases. Here we have a claimant who was understandably distraught over his brother's recent murder, but who felt he had to report for work nonetheless. During the shift, Mr. Logan received a photograph that had a further substantial and detrimental impact on his already compromised mental state. At that moment, the maintenance foreman enters the scene and immediately escalates the situation through a tactless, offensive utterance. When Mr. Logan responded in kind, the foreman continued to escalate the situation until it made it a full-blown crisis. That Mr. Logan was not at all in his right mind at the time is underscored by the psychiatric commitment that immediately followed the August 23 incident. Under the facts in evidence, the administrative law judge simply cannot find in Mr. Logan's actions or utterances a willful and wanton disregard of the employer's interests. Mr. Logan was discharged for no disqualifying reason. Accordingly, Mr. Logan is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The September 13, 2018, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The effective discharge date was August 27, 2018, when the claimant was indefinitely suspended. 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/scn