

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICK L MESSELHISER**  
Claimant

**APPEAL NO. 11A-UI-11604-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WILSON TRAILER CO**  
Employer

**OC: 07/31/11  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Rick Messelhiser filed a timely appeal from the August 22, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 17, 2011. Mr. Messelhiser participated. John Kreber, director of human resources, represented the employer. Exhibits One, Two, and Three 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: Rick Messelhiser was employed by Wilson Trailer Company as a full-time welder from 1997 until July 22, 2011, when John Kreber, director of human resources, discharged him for harassing a coworker. On July 20, 2011, Mr. Messelhiser called an African-American coworker a nigger and raised his middle finger in an offensive gesture directed at the same coworker. Another employee was present and witnessed the conduct. The African-American coworker reported the incident to his supervisor, who in turn reported the matter to Mr. Kreber. On July 21, Mr. Kreber interviewed all three employees who had been present at the time of the incident. At that time, the employer learned that Mr. Messelhiser was also in the habit of calling the African-American coworker colored boy, parts bitch, relay bitch, and that darned nigger. At the time the employer interviewed Mr. Messelhiser, he denied all accusations. Mr. Messelhiser now concedes that he did call the African-American coworker colored boy, parts bitch, and relay bitch. The two coworkers who had been present at the time of Mr. Messelhiser's conduct on July 20, provided the employer with a written statement on July 21. Mr. Messelhiser had participated in training aimed at preventing harassment in the workplace.

## REASONING AND CONCLUSIONS OF LAW:

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).

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).

The weight of the evidence in the record establishes that Mr. Messelhisser did indeed direct the offensive racial epithet at his African-American coworker on July 20 and did also direct the offensive gesture at that same coworker. That event was only the culmination of Mr. Messelhisser's ongoing harassment of the coworker through similar offensive and demeaning utterances. Mr. Messelhisser was discharged for misconduct. Accordingly, Mr. Messelhisser is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Messelhisser.

The administrative law judge notes that portions of Mr. Messelhisser's testimony were not credible. Mr. Messelhisser's statements regarding his conduct have evolved since the employer interviewed him on July 21. The offensive conduct on July 20 was observed by an independent witness, who had no reason to misrepresent Mr. Messelhisser's conduct to the employer. In any event, Mr. Messelhisser's admissions during the hearing lent credibility to the complaint that came to the employer's attention on July 21.

**DECISION:**

The Agency representative's August 22, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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