

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LARRY L WEAVER
Claimant

APPEAL NO. 19A-UI-03076-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COUNCIL BLUFFS COMM SCHOOL DIST
Employer

OC: 03/17/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Larry Weaver filed a timely appeal from the April 4, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the deputy's conclusion that Mr. Weaver was discharged on February 18, 2019 for conduct not in the best interests of the employer. After due notice was issued, a hearing was held on May 13, 2019. Mr. Weaver participated personally and was represented by attorney Joe Basque. Thomas Kuiper of Equifax represented the employer and presented testimony through John Fast, Staci Petit, Emily Warren and Kellie Fisher. Exhibit 1 and Department Exhibits D-1 through D-4, D-6 through D-9, and D-11 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: Larry Weaver was employed by the Council Bluffs Community School District as a full-time night custodian from 2005 until February 18, 2019, when he resigned in lieu of being discharged from the employment. On February 12, 2019, Mr. Weaver was part of a group of custodians assigned to clean Abe Lincoln High School. On that evening, there was a school function in which students, parents and teachers participated. At the end of that function, John Fast, Head Night Custodian directed the custodial staff to report to the cafeteria and commons area after lunch break to assist with cleaning and organizing those areas following the school function. It was common practice for all custodial staff to assist with such projects.

After the lunch break, Mr. Weaver returned to his regular assigned cleaning area, rather than reporting to the cafeteria and commons as directed. When Mr. Fast went to Mr. Weaver's area to collect him and escort him to the commons and cafeteria area the two ended up in an

argument about Mr. Weaver's refusal to follow Mr. Fast's directives. The argument continued as the pair made their way to the commons. Just as they reached the commons, Mr. Weaver told Mr. Fast, "Let's get off the cameras and we'll settle this like men." Mr. Weaver subsequently uttered additional threats that included, "We'll settle this after work" and a threat that Mr. Fast would not make it home. Mr. Weaver continued to behave in a belligerent manner while he assisted with the clean-up. While unfolding a table, Mr. Weaver did so with excessive force that made the table tip onto its side. Other staff, parents, and students were present in the commons and cafeteria area at the time Mr. Weaver engaged in the belligerent behavior. Mr. Weaver's conduct violated multiple established work rules. Mr. Fast summoned Staci Petit, Director of Facility Maintenance, to assist with the situation. Ms. Petit promptly reported to the facility to de-escalate the situation and commence an investigation.

On February 13, 2019, the employer placed Mr. Weaver on administrative leave while the employer continued its investigation. The employer interviewed Mr. Weaver and other custodial staff. One coworker declined to get involved. Two others provided statements that corroborated Mr. Fast's version of events. The employer reviewed video surveillance that documented Mr. Weaver's belligerent conduct and demeanor, but without audio.

On February 18, 2019, Emily Warren, Director of Compliance, met with Mr. Weaver and presented him with the choice of resigning or being discharged from the employment. Mr. Weaver elected to sign the resignation memo Ms. Warren had prepared.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code Rule 871-24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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).

The weight of the evidence establishes a discharge for misconduct in connection with the employment. The weight of the evidence establishes that Mr. Weaver did indeed threaten his supervisor, Mr. Fast, on February 12, 2019 and did indeed engage in additional belligerent conduct on that date. Mr. Weaver's utterances were an attack on the authority of Mr. Fast to direct Mr. Weaver's work. To make matters worse, Mr. Weaver's conduct took place in the presence of other staff and school guests. Mr. Weaver's conduct demonstrated an intentional and substantial disregard for the employer's interests in maintaining safe, orderly operations and work environment. Mr. Weaver is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Weaver must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The April 4, 2019, reference 01, decision is affirmed. The claimant was discharged on February 18, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. 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