

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROMAN M LUNA
Claimant

APPEAL NO. 11A-UI-03919-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BROADLAWNS MEDICAL CENTER
Employer

**OC: 02/20/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Roman Luna filed a timely appeal from the March 29, 2011, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on May 11, 2011. Mr. Luna participated. Attorney Peter Pashler represented the employer and presented testimony through Brian Croxton, Doug Anderson, and Julie Kilgore. Exhibits One through Six 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: Roman Luna was employed by Broadlawns Medical Center as a full-time Environmental Services Project Crew Technician from February 22, 2010 until February 23, 2011, when Brian Croxton, director of environmental services, discharged him from the employment. Mr. Croxton was Mr. Luna's immediate supervisor during the last several months of the employment. Doug Anderson, lead tech, also exercised supervisory authority over Mr. Luna and was responsible for assigning duties to Mr. Luna on a day-to-day basis.

The final incident that triggered the discharge occurred on February 23, 2011. On that morning, Mr. Anderson assigned Mr. Luna to housekeeping duties in the Ground Level Unit because the employee who ordinarily performed those duties was gone. Mr. Luna initially agreed to perform the assigned duties, but then asserted that another "float" employee should be assigned to the particular assignment. Mr. Anderson agreed with Mr. Luna and reassigned Mr. Luna to clean stairwells and elevators. Mr. Luna was concerned about what another worker, Jeff Johnston, was going to be assigned to do. Mr. Luna said, "Well, what's Jeff going to do, suck on your ass all day?" Mr. Luna uttered the remark so that it could be heard by Mr. Anderson, Mr. Johnston, and another employee, Dan Shaver. When Mr. Croxton arrived for work, Mr. Anderson reported the incident to Mr. Croxton. Before Mr. Croxton could conduct further investigation into the matter, Mr. Shaver made an independent report of the same utterance to Mr. Croxton.

Mr. Croxton sought out Mr. Johnston, who confirmed that Mr. Luna had uttered the remark directed at Mr. Johnston and Mr. Anderson.

Based on the February 23 incident, an interaction on February 22, and another incident on September 1, 2010, Mr. Croxton and Julie Kilgore, human resources director, decided to discharge Mr. Luna from the employment. Toward the end of the workday on February 23, Mr. Croxton summoned Mr. Luna to a meeting. Mr. Croxton told Mr. Luna what he had learned regarding the utterance that morning. Mr. Luna denied making the utterance. Mr. Croxton discharged Mr. Luna from the employment.

On September 1, 2010, Mr. Croxton conducted a meeting involving approximately 25 employees. Mr. Luna was one of the employees in attendance. Mr. Croxton had recently conducted Mr. Luna's six-month performance evaluation, at which time he had privately counseled Mr. Luna against roaming the halls at times when he was supposed to be performing work. During the meeting on September 1, 2010, Mr. Croxton covered a similar concern with the gathered group of employees, but in a more circumspect manner. Mr. Luna became upset when Mr. Croxton did not speak as frankly to the gathered group as he had spoken privately to Mr. Luna. In the middle of the meeting, Mr. Luna announced, "This is bullshit." The utterance was loud enough for all present to hear it and to disrupt the meeting. Mr. Croxton was several feet away from Mr. Luna, heard the remark, and directed Mr. Luna to report to his office. The next day, Mr. Croxton issued a written reprimand to Mr. Luna for the outburst.

The employer has an employee handbook that is available to employees via the employer's computer system. Mr. Luna had access to the handbook and, at the beginning of his employment, acknowledged in writing his obligation to comply with the handbook. The handbook contained Standards of Excellence that obligated Mr. Luna to treat others in the workplace with respect and dignity.

A few weeks prior to the discharge, Mr. Luna and others had brought a bed bug infestation to the attention of the employer. The employer hired a contractor to address the issue. Mr. Luna's role in reporting the infestation was not a factor in his discharge from the employment.

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). 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).

The weight of the evidence establishes that Mr. Luna did indeed utter the remark that Mr. Anderson, Mr. Shaver, and Mr. Johnston each attributed to him. The evidence establishes no reason whatsoever to discount Mr. Anderson's testimony concerning the remark he heard or Mr. Croxton's testimony regarding Mr. Shaver's independent report of the utterance or Mr. Johnston's confirmation of the remark. Mr. Luna's utterance on February 23 was patently offensive. The remark was a direct attack on a coworker, Mr. Johnston, and on the authority of

a supervisor, Mr. Anderson. The incident in and of itself constituted misconduct in connection with the employment that would disqualify Mr. Luna for unemployment insurance benefits. But, the final misconduct occurred in the context of an earlier, similar incident during which Mr. Luna uttered a profane remark as an attack on Mr. Croxton's supervisory authority. Both remarks were uttered in the presence of multiple coworkers.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Luna was discharged for misconduct. Accordingly, Mr. Luna 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. Luna.

The administrative law judge finds no merit whatsoever in Mr. Luna's assertion that he was discharged because he expressed his concern about the bed bug situation. The administrative law judge finds no merit whatsoever in Mr. Luna's assertion that his coworkers and supervisors conspired to discharge him on trumped up allegations. Mr. Luna testified to his generally good relationship with Mr. Anderson and other employees. The administrative law judge finds no merit whatsoever in Mr. Luna's assertion that Mr. Croxton was an overbearing supervisor who intimidated Mr. Luna during his employment or intimidated other employees into misrepresenting the incident from February 23. At no point during the two-hour appeal hearing did Mr. Luna appear intimidated by Mr. Croxton or did Mr. Croxton present himself as one who would resort to such tactics. Indeed, Mr. Luna appeared to be largely unmoved by Attorney Pashler's spirited cross-examination of Mr. Luna. The weight of the evidence indicated no connection whatsoever between the bed bug issue and Mr. Luna's discharge from the employment for vulgar outbursts.

DECISION:

The Agency representative's March 29, 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 will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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