

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT W LEHMAN
Claimant

APPEAL NO. 07A-UI-05684-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACTION WAREHOUSE CO LTD
Employer

**OC: 05/13/07 R: 02
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Robert Lehman filed a timely appeal from the May 31, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 25, 2007. Claimant participated. Kent Denning, Personnel Director, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Lehman was employed by Action Warehouse as a full-time forklift operator from June 28, 2004 until May 17, 2007, when Personnel Director Kent Denning discharged him. Final incident that prompted the discharge occurred on or about May 16. Mr. Lehman, Lead Man David Carlson and Quality Control employee Jack Martindale were in an office area for a break. Mr. Carlson quizzed Mr. Lehman as to why his work was not going more quickly. Mr. Martindale injected himself into the conversation between Mr. Carlson and Mr. Lehman. When Mr. Lehman provided an answer to Mr. Carlson that Mr. Martindale thought was non-responsive, Mr. Martindale interjected, "That wasn't the question." When Mr. Martindale did this, Mr. Lehman told Mr. Martindale, "Stay the fuck out of my business." Mr. Lehman also told Mr. Martindale that Mr. Martindale was not his "fucking boss." Mr. Lehman became angry and decided to splash Mr. Martindale with the water he had in a soda bottle. The water splashed on Mr. Martindale. The water also splashed on Mr. Carlson and onto the paperwork on a desk. Mr. Carlson and Mr. Martindale both were incensed by Mr. Lehman's act and Mr. Carlson reported the matter to Personnel Director Kent Denning. Mr. Denning conducted an investigation and spoke separately to Mr. Carlson, Mr. Martindale, and Mr. Lehman. Each individual provided a similar account of what had taken place.

The employer has a written zero-tolerance regarding workplace violence. The policy prohibits violent physical contact, harassment, and/or threatening or offensive language. Mr. Lehman signed his acknowledgment of the policy on August 3, 2004.

The employer had reprimanded Mr. Lehman on January 4, 2007, for entering into a profanity laced screaming match with a coworker on December 30, 2006 that led to Mr. Lehman and the coworker moving off the employer's property to fight. Mr. Lehman had received additional verbal reprimands for entering into verbal confrontations with coworkers. At the time Mr. Denning discharged Mr. Lehman, Mr. Lehman threatened Mr. Martindale with violence.

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. Id. 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).

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 evidence in the record establishes that on May 16, 2007, Mr. Lehman engaged in a physical display of aggression directed at a coworker. The evidence further indicates that Mr. Lehman uttered offensive language directed at the same coworker. The evidence indicates that Mr. Lehman had previously been reprimanded for aggressive behavior directed at one or more coworkers as well as offensive language directed at one or more coworkers.

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

DECISION:

The claims representative's May 31, 2007, 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

jet/pjs