

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW L GITCH

Claimant

APPEAL NO. 12A-UI-05982-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GYPSUM SUPPLY COMPANY

Employer

OC: 04/22/12

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated May 16, 2012, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on June 14, 2012. Claimant participated. The employer participated by Mr. Victor Schrage, Branch Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Matthew Gitch began unemployment with Gypsum Supply Company on February 1, 2011. The claimant was discharged from employment on April 27, 2012. Mr. Gitch worked as a full-time delivery driver/stocker and was paid by the hour. His immediate supervisor was Victor Schrage.

Mr. Gitch was discharged based upon allegations made by two or more employees that the claimant had challenged an employee to a fight and had given the employee his home address to facilitate the physical encounter. When questioned about the matter Mr. Gitch denied the allegation. Based upon previous incidents where the employer considered that Mr. Gitch had displayed aggressiveness or had been unable to rein in his temper, the employer considered the allegations to be truthful and discharged Mr. Gitch from employment.

Mr. Gitch had received a warning and suspension in December of 2011 after he was involved in a physical altercation with another employee. Mr. Gitch at the time maintained that he was not the aggressor. The other employee was discharged, Mr. Gitch was not. Subsequently the claimant received a warning for an incident that took place on April 6, 2012 where the claimant and another worker had engaged in a verbal exchange.

On April 25, 2012 Mr. Gitch experienced issues while working with an employee who had been assigned to assist Mr. Gitch. The claimant found that the other employee was not receptive to

work-related directives and the relationship between the two deteriorated after the other employee had told Mr. Gitch to “fuck off.” Because of issues brought to the attention of management by both Mr. Gitch and the other employee, the company met with the parties on the morning of April 26, 2012 and at that time instructed all the workers of the necessity that they work and cooperate with each other. Mr. Gitch met with the branch manager that morning and expressed concerns over the other employee’s previous conduct. At that time the claimant was allowed or instructed to take vacation for the remainder of the day and Mr. Gitch did so. The claimant considered the matter concerning his inability to work with the other worker on April 25 to be concluded. When Mr. Gitch reported to work the following day he was told that he was being discharged based upon another allegation that had been brought by one or more workers that Mr. Gitch had provided his address to entice another worker into a physical confrontation.

The claimant categorically denies providing his address to the other worker or further exacerbating the situation after the meeting held on the morning of April 26, 2012.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to establish a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. It is not.

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 insurance benefits. Conduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a 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).

In this matter the evidence in the record establishes that Mr. Gitch had been warned in the past for aggressive behavior towards other employees and for his inability to control his temper. The claimant had been warned and had served a suspension in the past for his previous conduct.

Most recently an issue developed between Mr. Gitch and another worker who was assigned to work with the claimant. Mr. Gitch reported that the employee was unwilling to follow work-related directives and that the worker had directed a vile epitaph personally to Mr. Gitch. Because of the other worker's conduct Mr. Gitch and the other worker engaged in a verbal exchange. In an effort to resolve the issue between the parties the company manager met with workers on the morning of April 26, 2012 and at the conclusion of the meeting believed that the matter was resolved. Subsequently that morning the claimant visited the branch manager's office in an attempt to further resolve the ongoing issues and the claimant was either advised or requested vacation for the rest of the day. The claimant was allowed to leave for the remainder of the workday. In the claimant's absence it appears that one or more individuals then indicated that Mr. Gitch had challenged a worker to a fight giving the worker Mr. Gitch's home address to facilitate the confrontation. Mr. Gitch categorically denied the allegation at the time that it was made and continues to deny the allegation at the time of hearing. The claimant testified that he had no further contact with the other workers and denies under oath challenging any other workers to a fight or providing his address to facilitate the fight.

In this matter the claimant appeared personally and provided firsthand sworn testimony. In contrast the employer chose to rely on hearsay testimony in support of its position. While hearsay is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony providing that the sworn direct testimony is credible and is not inherently improbable.

The administrative law judge concludes that the employer has not sustained its burden of proof in establishing disqualifying misconduct at the time of job separation. The claimant has categorically denied the final incident and the evidence in support of the employer's position on that matter is not sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed providing the claimant meets all other eligibility requirements.

DECISION:

The representative's decision dated May 16, 2012, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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