

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JORGE CASTENDA HERNANDEZ
Claimant

APPEAL NO: 14A-UI-00852-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXEL INC
Employer

**OC: 12/22/13
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The employer appealed a department decision dated January 15, 2014, reference 01, that held the claimant was not discharged for misconduct on December 23, 2013, and benefits are allowed. A telephone hearing was held on February 13, 2014. The claimant, and Interpreter, Marita Gibbs participated. Maria Valles, HR manger, Jose Vargas, Supervisor, and Jim Lydic, Operations Manager, participated for the employer. Employer Exhibit 1 (E-1 thru E – 18) was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record, finds: The claimant was hired on December 19, 2005, and last worked for the employer as a full-time forklift operator on December 23, 2013. He had received the employer policies in an employee handbook.

It is a Class I rule violation for discourteous or impolite treatment of associates, managers, customers or other authorized visitors. It is a class two rule violation for threatening or inflicting bodily harm on a co-worker, supervisor, manager or customer. This is considered gross misconduct subject to employment termination.

The employer issued claimant a final written notification for a Class II violation of rule #14. He was accused of having an altercation with an associate that involved name calling, physical threats and use of profanity. Claimant refused to sign because he disagreed with it.

On December 13 two dock workers reported claimant threatened to punch them out, kick their ass, called them pussies. The employer received written reports from the workers and a supervisor. When claimant was questioned he denied threats but admitted he might have used the word pussy. The employer did not show claimant the reports.

After the investigation concluded, the employer terminated claimant for repeated Class II rule violations.

Employer supervisor Vargas participated at department fact finding.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge concludes the employer has failed to establish claimant was discharged for a current act of misconduct in connection with employment on December 23, 2013.

The employer failed to offer the supervisor and dock workers as witnesses in this hearing and it failed to offer their written reports. Claimant denies making physical threats against the dock workers and the employer has failed to offer evidence that it has available to refute it. Claimant denied the December 2013 incident and the written discipline offers no specific information as to what the claimant said and did.

While using the word pussy might constitute a poor reference to a male person it is not profanity. Employer did not discipline claimant for refusing to sign for the May 2 matter and it was his way of denying it. Viewing the record as a whole the evidence does not establish claimant was discharged for misconduct and a current act of misconduct.

DECISION:

The department decision dated January 15, 2014, reference 01, is affirmed. The claimant was not discharged for misconduct on December 23, 2013. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs