

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL F DELONG
Claimant

APPEAL NO. 13A-UI-09314-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERRARA CANDY COMPANY
Employer

OC: 07/14/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Michael Delong filed a timely appeal from the August 7, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 18, 2013. Mr. Delong participated. Deanne Boles, Human Resources Specialist, represented the employer. Exhibits Two through Eight 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: Michael Delong was employed by Ferrara Candy Company as a full-time packer from 2011 until July 17, 2013, when Tom Lensing, Operations Manager, discharged him from the employment for fighting on the job. On July 16, 2013, a coworker, Shely Berg, verbally antagonized Mr. Delong throughout the day about keeping the catch station stocked with trays. Ms. Berg used profanity liberally. Toward the end of the shift, while Mr. Delong was performing end-of-shift cleaning duties, Ms. Delong uttered additional profanity directed at Mr. Delong and Mr. Delong responded in kind. Both were angry. Both charged toward each other. At a point where Mr. Delong was stationary, Ms. Berg was still charging at him. Mr. Delong put his hands up and Ms. Berg made contact with one or both of his hands. Ms. Berg alleged to Mr. Lensing that Mr. Delong had pushed her. Mr. Lensing collected written statements from a couple employees and verbal statements from others. The employer alleges that Mr. Delong admitted to pushing Ms. Berg during his discussion with Mr. Lensing. Mr. Delong denies having made such a statement and asserts that Mr. Lensing would not listen to what he was saying. The employer did not have Mr. Delong or Ms. Berg provide a written statement.

The employer has a written policy that prohibits fighting in the workplace and has a zero tolerance policy for violence in the workplace.

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) alone. 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 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 employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish that Mr. Delong did indeed engage in conduct that rose to the level of fighting in workplace. Mr. Delong asserts he was stationary when Ms. Berg made contact with him and that he had merely raised his hands as she was charging at him. The employer did not present testimony from anyone with personal knowledge of the incident that triggered the discharge. The employer had the ability to present testimony from persons with personal knowledge. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Delong was discharged for no disqualifying reason. Accordingly, Mr. Delong is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The agency representative's August 7, 2013, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs