

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY R PHILLIPS
Claimant

APPEAL NO. 14A-UI-00319-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS HEALTH SYSTEM
Employer

OC: 12/15/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 3, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 3, 2014. Claimant Jeffrey Phillips participated. Brandi Tiesman represented the employer and presented additional testimony through Bill Schmidt. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Eight were received into evidence. The administrative law judge took official notice of the documents submitted for and generated in connection with the fact-finding interview for the sole purpose of determining whether the employer participated in the fact-finding interview within the meaning of the law.

ISSUES:

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

Whether the claimant has been overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer participated in the fact-finding interview.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeffrey Phillips was employed by Genesis Health System as a Pharmacy Tech from March 2012 until August 21, 2013, when the employer discharged him from the employment. The incident that triggered the discharge occurred toward the end of Mr. Phillips' shift on August 20, 2013. The pharmacy had recently lost two employees and was short staffed. Mr. Phillips attempted to engage in dark humor and told two fellow pharmacy techs that the employees should revolt

against the C.E.O. Mr. Phillips added that he should show up at the C.E.O.'s house with an AK47. Mr. Phillips offered, tongue-in-cheek to pay \$5.00 for the C.E.O.'s address. Mr. Phillips made further mention of burning down the C.E.O.'s house. Mr. Phillips' comments were based on and borrowed from a movie he had recently seen. One of Mr. Phillips' coworkers was disturbed by the comments and reported them to the employer in an email.

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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

The weight of the evidence fails to establish any actual intent on the part of Mr. Phillips to do harm to the C.E.O. or anyone else. The evidence indicates instead an instance of extremely poor judgment on the part of Mr. Phillips and a misguided attempt at gallows humor. The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to indicate that Mr. Phillips' utterance was anything more than gallows humor. Mr. Phillips' error in judgment did not rise to the level of misconduct in connection with the employment. Accordingly, the evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, the administrative law judge need not consider matters from earlier in the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Phillips was discharged for no disqualifying reason. Accordingly, Mr. Phillips is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's January 3, 2014, reference 01, decision is affirmed. 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