IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DUANE LANKFORD
Claimant

VERMEER MANUFACTURING CO INC
Employer

APPEAL NO. 15A-UI-00366-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/14/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Duane "Dewey" Lankford filed a timely appeal from the January 5, 2015, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on February 25, 2015. Mr. Lankford participated. Cornie Van Walbeck represented the employer and presented additional testimony through Julie Schurman, Ryan Kirk, and Ryan May. Exhibits One through Six 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: Duane "Dewey" Lankford was employed by Vermeer Manufacturing Company, Inc. as a full-time machine specialist from July 2013 until December 12, 2014 when the employer discharged him from employment. On December 4, 2014 the employer had suspended Mr. Lankford in connection with a safety incident. Mr. Lankford was due to return to work from suspension on December 9. On December 8 Mr. Lankford went to the workplace to borrow money from a coworker. Another machine specialist, Ryan Kirk, noticed Mr. Lankford in the workplace. Mr. Kirk mentioned to a supervisor that Mr. Lankford had been at the workplace and asked the supervisor whether Mr. Lankford was on suspension.

When Mr. Lankford returned from his suspension, the employer met with him to discuss his presence in the workplace at a time when he was supposed to be on a disciplinary suspension. Mr. Lankford commented at the time, in reference to his coworkers, that he had to work "with a bunch of children."

On December 10, 2014 Mr. Lankford encountered Mr. Kirk. As Mr. Lankford walked by, Mr. Lankford told Mr. Kirk to "fuck off." The comment was in reference to Mr. Kirk telling the employer that Mr. Lankford had come to the workplace while on suspension. Mr. Kirk reported Mr. Lankford's comment to a supervisor.

On December 12 the employer met with Mr. Lankford. When the employer asked Mr. Lankford whether he made the comment that Mr. Kirk attributed to him, Mr. Lankford responded that he "might have" but was "unsure." The employer has a written policy that prohibits "language or conduct deemed abusive, threatening, obscene, profane, disruptive or which shows a lack of respect for other individuals." The policy indicates that violation of the policy could lead to disciplinary action up to termination of the employment. The policy is contained in the employee handbook that the employer provided to Mr. Lankford at the start of his employment. The employer is aware that some of its employees use offensive language in the workplace. The employer prohibits the conduct and disciplines the offending employees when the employer concludes there is sufficient evidence to establish that the employee had violated the policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.
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> This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 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. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). 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).

The evidence in the record establishes misconduct in connection with the employment. The weight of the evidence does not support Mr. Lankford's assertion that he was merely uttering profanity to himself on December 10. The weight of the evidence supports the employer's assertion that Mr. Lankford specifically targeted Mr. Kirk for the offensive comment because Mr. Lankford was angry with Mr. Kirk for telling the employer that Mr. Lankford was in the workplace at a time when he was supposed to be suspended. In other words, Mr. Lankford's offensive comment was in retaliation for Mr. Kirk making a report to the supervisor. Mr. Lankford knowingly and intentionally violated the employer's policy prohibiting offensive language and conduct.

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

DECISION:

The January 5, 2015, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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