

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAWRENCE W WAHLEN
Claimant

APPEAL NO. 11A-UI-16469-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMUNITY CARE INC
Employer

OC: 11/20/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Lawrence Wahlen filed a timely appeal from the December 13, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 25, 2012. Mr. Wahlen participated and presented additional testimony through Valerie Reed. Tina McQuiston represented the employer and presented additional testimony through Elaine Colclasure. Exhibits Three through Seven 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: The employer provides life skills support and respite services to persons with disabilities. Lawrence Wahlen was employed by Community Care, Inc., as a part-time direct support professional from 2009 until November 16, 2011, when Tina McQuiston, HCBS manager, discharged him based on a threat he uttered in the workplace on November 11, 2011.

On November 11, Mr. Wahlen went to the office where his supervisor, Elaine Colclasure, worked for the purpose of delivering a doctor's note that excused him from getting a flu shot. Mr. Wahlen took with him a client who was in his care at the time. Ms. Colclasure was HCBS supervisor. Mr. Wahlen initially spoke with the receptionist. Ms. Colclasure greeted Mr. Wahlen while he was speaking with the receptionist. Mr. Wahlen then entered Ms. Colclasure's office with a bag. Ms. Colclasure asked him why he was going into her office. Mr. Wahlen replied that that he was not giving her his body. Mr. Wahlen added that Ms. Colclasure would not want his body, because it was old and wrinkly. Ms. Colclasure attempted to move beyond the awkward moment and comments by telling Mr. Wahlen that he was crazy and was being silly. Mr. Wahlen had previously made comments to Ms. Colclasure about the attractiveness of her hair that had made her uncomfortable and that had seemed to her to indicate some romantic or sexual interest in her. When Ms. Colclasure entered the back office area, she observed that Mr. Wahlen had brought some plants into her office. Ms. Colclasure and Mr. Wahlen both liked

plants. Ms. Colclasure thanked Mr. Wahlen for the plants and Mr. Wahlen returned to the main area of the office.

Mr. Wahlen then picked up some documents he had previously worked on but which needed corrections. Mr. Wahlen then said he had had it with HCA, home care aide services, and that it was not worth it. Mr. Wahlen then complained about the employer's flu shot requirement. Mr. Wahlen added that he had been in contact with the home care aide secretary and the human resources supervisor to complain about the employer's flu shot policy. Mr. Wahlen stated that he had received calls about needing to get a flu shot. Ms. Colclasure told Mr. Wahlen that the flu shot requirement was policy and that everyone had to comply. The employer required staff to get a flu shot because the employer provided in-home services to some clients who were medically fragile. Mr. Wahlen presented the medical documentation regarding his allergic response to eggs and about not being able to get a flu shot. Mr. Wahlen continued to talk negatively about his interaction with the human resources supervisor in connection with the flu shot issue. Mr. Wahlen said he did not like the way the administration was handling the matter. Mr. Wahlen asserted that the human resources supervisor had told him, "You know where the door is." Mr. Wahlen added that it made him want to get a gun. Mr. Colclasure told him she would not say that. Ms. Colclasure perceived the statement as a threat against the human resources supervisor or others in the workplace. Ms. Colclasure reported the incident and the utterances to Ms. McQuiston the same day. The employer suspended Mr. Wahlen the same day.

The employer has a written Violence in the Workplace Policy. The policy prohibited all forms of violence, including threats of violence, and indicated that any form of violence would be cause for disciplinary action up to and including termination of employment. Mr. Wahlen was aware of the policy.

The employer has a written Equal Opportunity and Harassment Policy. The policy prohibited unwelcome sexual advances, other verbal or physical conduct of a sexual nature, and conduct that had the purpose or effect of substantially interfering with a person's work performance by creating an intimidating, hostile, or offensive work environment. The policy subjected offenders to disciplinary action up to and including discharge from the employment. Mr. Wahlen was aware of the policy.

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).

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 in the record establishes that Ms. Colclasure correctly interpreted Mr. Wahlen's gun comment as a threat against the human resources supervisor and others in the workplace. The weight of the evidence indicates that Mr. Wahlen intended to communicate a threat at the time, but has since engaged in creative re-interpretation of the utterance. Nothing about the context of the utterance suggests that it was directed at Mr. Wahlen's person. The context of the utterance was Mr. Wahlen's anger and hostility over being hounded to get a flu shot. The context of the utterance indicated a threat directed at the human resources supervisor and others. The uttered threat constituted misconduct in connection with the employment. There is an additional aggravating factor and that is the fact that the employer served a vulnerable client base. The employer had good reason to perceive Mr. Wahlen as a threat to clients and staff as a result of his utterance.

Mr. Wahlen's comments to Ms. Wahlen about not giving her his body were inappropriate, but did not rise to the level of sexual harassment and would not by themselves have established misconduct in connection with the employment. What the comments do indicate is the same sort of disregard on the part of Mr. Wahlen for how others received and perceived his utterances.

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

DECISION:

The Agency representative's December 13, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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