

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GARY A IRVING**  
Claimant

**APPEAL NO. 06A-UI-10831-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DOMINIUM MANAGEMENT SERVICES INC  
DOMINIUM INC**  
Employer

**OC: 10/08/06 R: 02  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Gary Irving filed a timely appeal from the November 1, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on December 11, 2006 and completed on December 15, 2006. Mr. Irving participated. Human Resources Generalist Tonya Hansen represented the employer. Exhibits A through T, V through Z, and AA through EE were received into evidence. At the employer's request, the administrative law judge took official notice of the Agency's administrative file, including documents submitted for the fact-finding interview, and marked Department Exhibits D-1 through D-8 for identification purposes. Both parties were provided with a copy of the administrative file prior to the hearing.

**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: Gary Irving was employed by Dominion Management Services as a full-time maintenance technician from August 10, 2005 until October 5, 2006, when Regional Manager Diane Witt discharged him. The employer is an apartment management company. At the time of the discharge, Mr. Irving's immediate supervisor was Community Manager Melinda Lane.

The final incident that prompted the discharge occurred on October 3, 2006. On that date, Ms. Lane summoned Mr. Irving to a meeting for the purpose of issuing a written reprimand. Before Ms. Lane could fully review the reprimand with Mr. Irving, Mr. Irving grabbed the written reprimand from Ms. Lane and tore it up. Mr. Irving then intentionally failed to answer a page from Ms. Lane, slammed two pagers down on Ms. Lane's desk and told Ms. Lane, "I'm not dealing with this shit!" Mr. Irving admits grabbing the reprimand and tearing it, but denies the other allegations. Ms. Lane is still employed with Dominion, but did not testify.

The written reprimand Mr. Irving tore addressed several recent incidents and/or concerns. The reprimand referenced several instances where Mr. Irving had gone to another worksite without proper approval from Ms. Lane. The reprimand referenced that on September 26, Mr. Irving had urinated in the office restroom without closing the door at a time when Ms. Lane was working a short distance down the hall. Mr. Irving admits to the restroom incident, but minimizes the inappropriateness of the conduct. The reprimand also referenced that Mr. Irving was not completing assigned projects on time and was not following Ms. Lane's instructions. Mr. Irving admits to not completing assigned projects on time, but asserts this was due to obstacles imposed by the employer. The reprimand referenced that Mr. Irving made inappropriate remarks to tenants and that he became upset/irritated when Ms. Lane attempted to direct his work. Regional Manager Diane Witt had only recently assigned Mr. Irving to work with Ms. Lane at a single worksite as a means of better tracking his work performance. The October 3 reprimand was prompted, in part, by a resident's written complaint on September 28 that Mr. Irving had refused to repair a ceiling fan and had made negative, insensitive and/or cavalier remarks to the resident in connection with the refusal. Mr. Irving admits to leaving the resident's home without fixing the fan, but asserts that he later returned to complete the work.

The above reprimand followed shortly after a written reprimand Ms. Witt had issue to Mr. Irving on September 22, 2006. That reprimand cited several instances on September 12, 17 and 18, wherein Mr. Irving failed to respond to pages. The reprimand also referenced absences that Mr. Irving reported to a person other than Ms. Witt, despite having been recently directed and reminded of the need to report his absences to Ms. Witt. Mr. Irving had received prior reprimands from Ms. Witt and/or another supervisor for inappropriate and/or profane comments uttered to the supervisor in the presence of residents, for his refusal to take direction from the supervisor, and for his failure to complete work in the allotted time. Ms. Witt had assumed direct supervision of Mr. Irving's work after the relationship between Mr. Irving and another supervisor provided unworkable.

From March 2006 to the end of September 2006, Mr. Irving participated in mental health treatment with a social worker/therapist. Mr. Irving's work environment and work relationships were significant foci of the treatment. Mr. Irving felt overwhelmed by his work duties.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Irving was discharged for misconduct in connection with the employment. It does.

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).

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).

*Continued* failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

Despite the employer's failure to present testimony from individuals with firsthand knowledge of the events leading up to the discharge, the greater weight of the evidence indicates that Mr. Irving was discharged for misconduct in connection with the employment. The misconduct took the form of offensive/inappropriate conduct directed at supervisors, insubordination, and recurrent negligence. Regarding the final incident that prompted the discharge, the evidence clearly establishes that Mr. Irving ripped up the written reprimand Ms. Lane intended to issue to him. This act was in open defiance of Ms. Lane's supervisory authority. The greater weight of the evidence indicates that Mr. Irving uttered the profane remark attributed to him and engaged in the other conduct attributed to him, including failure to respond to the page and slamming the pagers on the desk. The remark and further conduct were additional direct challenges to Ms. Lane's supervisory authority. The weight of the evidence indicates that Ms. Lane's conduct on October 3 was reasonable and appropriate, but that Mr. Irving's responses were unreasonable and inappropriate. This final incident was sufficient misconduct to disqualify Mr. Irving for unemployment insurance benefits.

The greater weight of the evidence indicates that the final incident that prompted the discharge followed several similar instances where Mr. Irving intentionally failed to follow the instructions of a supervisor, where he failed to respond to pages or otherwise responsibly carry out his duties, or where Mr. Irving made inappropriate and/or profane remarks to a supervisor and/or in the presence of tenants. The employer had the authority to direct Mr. Irving's work. The greater weight of the evidence indicates that Mr. Irving demonstrated the same insubordination, offensive conduct and/or language, and the same negligence, while under the supervision of at least three separate supervisors.

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

**DECISION:**

The Agency representative's November 1, 2006, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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