

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**ART R COONS
6921 NW BEAVER DR
JOHNSTON IA 50131**

**CITY OF DES MOINES
PAYROLL DEPT – BERYL GUY
400 ROBERT D RAY DR
DES MOINES IA 50309**

**CHARLES GRIBBLE
ATTORNEY AT LAW
2910 GRAND AVE
DES MOINES IA 50312**

**Appeal Number: 05A-UI-03714-DW
OC: 03/13/05 R: 02
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Art R. Coons (claimant) appealed a representative's April 7, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of City of Des Moines (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, in-person hearings were held on April 26 and May 18, 2005. The claimant participated in the hearings with his attorney, Charles Gribble. Jason Preston appeared as a witness for the claimant. Carol Moser, attorney at law, appeared on the employer's behalf. Larry Hulse, Rod Van Wart, Willie Robinson, Phil Delafield, Steve Gunsor and Mike Carter appeared on the employer's behalf. During the hearing, Employer's Exhibits 1 through 14 were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in 1985. Prior to his separation, the claimant worked as a full-time mechanical engineer inspector. Van Wart was the claimant's most recent supervisor.

On January 25, 2005, the claimant took a phone call from Green's Construction. The representative from Green's was upset because one of the employer's inspector's plumbing reports prevented Green's from receiving a \$5,000.00 payment. Green's identified this person as P.B. P.B. was sitting close by so the claimant spoke loud enough for her to hear to see if she had any information to provide to the claimant while he talked to the Green's representative. After telling the Green's representative he would look into the situation and get back to him, the claimant talked to P.B. While they were talking, a communication breakdown occurred. P.B. became very upset with the claimant and accused him of calling her a liar. The claimant made a comment that P.B. was "as dumb as a stick" because if she would just look at her computer she would have known the job site in question had two plumbing permits. P.B. swore and went to Van Wart's office.

While in Van Wart's office, both the claimant and P.B. explained what had happened. P.B. became more agitated and walked out of Van Wart's office. Later, Van Wart and the claimant discovered P.B. had not been the plumbing inspector even though the Green's representative indicated she was the person responsible for the problem. Around 4:00 p.m. on January 25, the claimant went to P.B. to apologize for their earlier verbal confrontation. The claimant tried to explain that she was not the person who had done the plumbing inspection. The claimant also wanted her to realize the job site had two plumbing permits. P.B. told the claimant she did not want to discuss this again. When the claimant told her that he thought she was being "thin-skinned," P.B. then accused the claimant of calling her names and went back to Van Wart's office to complain that she felt threatened and harassed by the claimant.

The employer started an investigation into P.B.'s complaints. Even though P.B. had never previously complained about the claimant, she reported incidents and comments the claimant was involved in that were over ten years old. The claimant and P.B. had worked together for around 17 years. The last five years, they worked the same assigned areas and had several heated discussions about work-related issues. The only recent incident that P.B. reported as threatening or harassing occurred on January 25, 2005.

In early February 2005 the employer gave the claimant a letter notifying him that he was going to have a pre-disciplinary hearing. (Employer Exhibit 11.) The claimant was surprised by this development. After he received the notice, he made a comment that if he would have called her a F###\$# C##*(#, he would not have gotten into any more trouble. P.B. was not present when the claimant made this remark. Male employees were present and heard the remark.

The employer put the claimant on administrative leave from February 3 to 8, 2005. The claimant returned to work on February 10. (Employer Exhibit 14.) Van Wart told the claimant to stay away from plumbing inspectors unless he has official business with them. On February 8, Robinson started the employer's investigation of P.B.'s complaints. After the

claimant returned to work on February 10 there were no incidents between the claimant and P.B.

Through Robinson's investigation, some employees verified some of P.B.'s reported incidents. The employer did not ask the claimant for his explanation of any of her complaints. P.B. provided no explanation as to why she had not reported any problems prior to January 25, 2005. Robinson submitted his completed report to the employer on March 9, 2005. Robinson's report concluded the claimant had not only physically threatened P.B. but also made profane and derogatory comments about her. Robinson also reported the comment the claimant made after he received notice of the pre-disciplinary hearing in early February 2005. (Employer Exhibit 2.)

The employer held a disciplinary hearing on March 14, 2005. The claimant attended this hearing. Based on the employer's investigation, the employer decided to discharge the claimant. On March 14, the employer sent a certified letter to the claimant informing him that he was discharged for violating the employer's workplace policies. (Employer Exhibits 12 and 13.)

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

Based on the employer's investigation and the conclusions made as a result of interviewing employees, the employer established compelling business reasons for discharging the claimant. For unemployment insurance purposes, the employer has the burden to establish that the claimant committed a current act of work-connected misconduct. The evidence does not establish that the claimant intentionally and substantially violated the employer's workplace policy or intentionally harassed a co-worker.

This conclusion was made for several reasons. First, the employer relied almost solely on reports from witnesses who did not testify at the hearing. The claimant's testimony is credible and must be given more weight than the employer's reliance on hearsay information. Next, the evidence also shows that only after the January 25 "blow up," P.B. felt it necessary to report incidents that occurred over ten years ago. Even if her complaints are considered accurate, the most incidents, with the exception of January 25, 2005, happened over two years ago. Third, there is nothing in the evidence explaining why P.B. waited over ten years to report the claimant's alleged threatening behavior. The employer asserted she felt threatened, but without her testimony, the evidence does not establish a plausible explanation as to why she said nothing prior to January 25, 2005.

Initially, Van Wart wanted to handle the January 25 incident by having the claimant apologize to P.B. and possibly receive some counseling. Van Wart's initial response to the January 25 incident was reasonable. Unfortunately, P.B. apparently did not consider the claimant's remarks to her around 4:00 p.m. on January 25 to constitute an apology. The claimant used poor judgment when he again tried to explain or show P.B. that the job site in question had two plumbing permits. P.B. considered this exchange just another incident of harassment and then complained about the claimant calling her names. Without P.B.'s testimony, the evidence indicates her complaints and accusations appear to be exaggerated and unfounded.

The claimant's remarks in early February after he learned about the pre-disciplinary hearing are understandable under the circumstances. The claimant was frustrated and upset, especially since he considered P.B. a friend and had no idea she considered him to have harassed or threatened her. The claimant's comment was not personally directed to P.B.

After thoroughly reviewing the credible evidence, the claimant's conduct when he "attempted to apologize" the afternoon of January 25 was unnecessary, but a current act of work-connected misconduct has not been established in this case. Therefore, as of March 13, 2005, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's April 7, 2005 decision (reference 01) is reversed. The employer discharged the claimant for business reasons that do not constitute a current act of work-connected misconduct. As of March 13, 2005, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/s