

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDY J DUCHARME
Claimant

APPEAL NO. 16A-UI-11478-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PEOPLES COMMUNITY HEALTH CLINIC
Employer

OC: 09/25/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Randy Ducharme filed a timely appeal from the October 14, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Ducharme was discharged for misconduct in connection with the employment. After due notice was issued, a hearing was held on November 7, 2016. Mr. Ducharme participated. Beth White represented the employer and presented additional testimony through Christine Kemp and Jennifer Lightbody. Exhibits 1, 2 and 3 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: Randy Ducharme was employed by Peoples Community Health Clinic as the full-time Facility Manager from 2014 until September 30, 2016, when Jennifer Lightbody, Chief Executive Officer, discharged him from the employment. Christine Kemp, Chief Operating Officer, was Mr. Ducharme's immediate supervisor. Mr. Ducharme and Ms. Kemp's personalities, communication styles and limited perspectives sometimes hindered their communication with one another and sometime led each to conclude that the other had communicated in a disrespectful manner.

The final incident that triggered the discharge was a meeting on September 30, 2016. Ms. Kemp had set up the meeting with Jennifer Lightbody, Chief Executive Officer, for the purpose of issued a written reprimand in response to an earlier incident on September 19. On September 19, Ms. Kemp and Mr. Ducharme were discussing vendor bids for a remodeling project. At Ms. Kemp's request, Mr. Ducharme brought her a preliminary vendor bid for carpet. Ms. Kemp thought the bid seemed high. Ms. Kemp conducted a Google search and determined that the bid was for the wrong carpet pattern. The carpet pattern needed for the project was Northern Lights. The bid document was for carpet pattern Urban Jungle. The employer had

boxes of each stored in the basement in connection with prior projects. Mr. Ducharme asserted that the bid was for the same carpet pattern stored in the basement. The carpet for the remodeling project was supposed to match the existing Northing Lights carpet. Ms. Kemp led Mr. Ducharme to the basement and determined that Mr. Ducharme had taken the pattern name from the wrong box of carpet. Ms. Kemp communicated her frustration with Mr. Ducharme through her facial expression, by audibly sighing, and by walking away. Mr. Ducharme then said that he was color blind and could not tell the difference between the carpets. Ms. Kemp pointed out the difference in the pattern name. Mr. Ducharme responded that the vendor had said that the carpet pattern in the bid was the correct pattern. Mr. Ducharme attempted to continue the conversation as Ms. Kemp walked up the stairs. He told Ms. Kemp that it seemed like she was looking for things to be upset about concerning his job performance. Ms. Kemp said she was not prepared to continue the conversation at that time. Mr. Ducharme then said, "What is wrong with you?" Mr. Ducharme asserted that Ms. Kemp was trying to make him quit. Ms. Kemp turned around told Mr. Ducharme that he was being disrespectful and unprofessional. When Ms. Kemp returned to her office, she sent an email message to Beth White, Human Resources Administrator, asking Ms. White to set up a meeting on September 21 so that Ms. White, Ms. Kemp and Mr. Ducharme could meet.

Immediately following the interaction with Ms. Kemp on September 19, Mr. Ducharme had gone to Ms. White's office to vent his frustration and to receive guidance regarding how he should proceed. Ms. White could see that Mr. Ducharme was upset. Mr. Ducharme told Ms. White that he had just interacted with Ms. Kemp, that Ms. Kemp had walked away, and that he was just trying to figure out what to do. It was common for employees to use Ms. White as a sounding board. Mr. Ducharme asked Ms. White whether the interaction would lead to him being fired. Ms. White told Mr. Ducharme that there was little chance of him being discharged if he did not say anything inappropriate. Mr. Ducharme told Ms. White that he could never do anything right and that Ms. Kemp was always looking for error with him. Ms. White was aware that Ms. Kemp and Mr. Ducharme had difficulty communicating with one another. Mr. Ducharme told Ms. White that he had not raised his voice, that he had just said, "What's your problem, Chris," in an effort to fix the problem. Ms. White told Mr. Ducharme that she had worked with Ms. Kemp for a long time, that Ms. Kemp was not going to have a conversation when she was unready for the conversation, and that for Ms. Kemp to say that she was not ready for the conversation and walk away was a good thing.

On the morning of September 21, Ms. Kemp cancelled the meeting with Ms. White. She had decided that since Mr. Ducharme was part of the management team, the meeting should include Jennifer Lightbody, Chief Executive Officer. Ms. White notified Mr. Ducharme that the meeting was cancelled. When Mr. Ducharme again expressed concern to Ms. White that he was about to be fired, Ms. White reassured Mr. Ducharme that the meeting would be good.

On the afternoon of September 30, Ms. Lightbody and Ms. Kemp met with Mr. Ducharme in Ms. Lightbody's office. The meeting lasted about 10 minutes. The three sat around a table. Ms. Kemp read the written reprimand she had prepared for Mr. Ducharme. Ms. Kemp had set forth her version of incident in the reprimand document. Ms. Kemp had also made reference in the document to a similar incident of alleged disrespectful and unprofessional behavior in March 2016. As Ms. Kemp was reading the reprimand, Mr. Ducharme interrupted a few times. Ms. Kemp then told Mr. Ducharme to let her read the document and he complied. Ms. Kemp then told Mr. Ducharme to sign the document to indicate that he had read it and had received a copy. Mr. Ducharme signed the document. Mr. Ducharme asked whether they were going to *talk* about the warning. Mr. Ducharme asserted that the incident did not happen as set forth in the reprimand. Mr. Ducharme went on to assert that others did not like to work for Ms. Kemp and that he had had trouble working with her for some time. The meeting was upsetting to

Mr. Ducharme. During the meeting, Mr. Ducharme expressed his agitation and frustration through animated arm gestures. The gestures were not aggressive in nature. Ms. Lightbody stated, "My goal is to make sure you two can get along." Ms. Lightbody added that if there was an issues with how particular behavior is perceived, that employer had an employee assistance program (EAP) that could perhaps help Mr. Ducharme to understand how others perceived his action. Mr. Ducharme briefly laughed and then stated, "I'll go to EAP because you ladies are paying for it. I will use it to show that Chris Kemp is not a good supervisor." Ms. Lightbody drew attention to Mr. Ducharme's arm gesturing and the fact that his voice was louder than normal. Ms. Lightbody then stated, "At this point, it does not seem like this is going to work between the two of you and that you're not willing to work with us." Ms. Lightbody added that the matter was not going to go any further and that she was ending Mr. Ducharme's employment.

The employer points to earlier concerns with how Mr. Ducharme communicated with other staff. Mr. Ducharme denies the employer's characterization of those matters.

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.

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). 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).

The weight of the evidence in the record establishes a discharge that was essentially based on a personality conflict between Mr. Ducharme and Ms. Kemp. The evidence does not establish a willful or wanton disregard of the employer's interests. The weight of the evidence established that Ms. Kemp and Mr. Ducharme each contributed to the breakdown in the working relationship by failing to try to see things from the other's perspective. Mr. Ducharme performed his duties in good faith, but made errors that were irritating to Ms. Kemp. Ms. Kemp did not hide her displeasure. Mr. Ducharme was not fully aware of how his actions and comments were perceived by others. Nor was Ms. Kemp. The evidence establishes that Mr. Ducharme's comments and conduct on September 19 and 30 were motivated in large part by fear, by his feeling that he, as the subordinate, was under attack. The weight of the evidence indicates that such a conclusion was not unreasonable. The weight of the evidence does not support the

employer's assertion that Mr. Ducharme was intentionally disrespectful, unprofessional, or aggressive. The administrative law judge inquired fully into whether Mr. Ducharme's actions were motivated by an inherent disrespect for women, or female leaders. The weight of the evidence establishes they were not. Mr. Ducharme's contact with Ms. White immediately following the September 19 interaction with Ms. Kemp demonstrated that he was sincere in trying to find a path forward in his relationship with Ms. Kemp and trying to be mindful of boundaries. The employer elected to escalate the situation and Mr. Ducharme responded in a manner that was wholly foreseeable. In truth, Mr. Ducharme's response during the September 30 meeting was fairly mild given the circumstances.

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

DECISION:

The October 14, 2016, reference 01, decision is reversed. 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/rvs