

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**EVAN STALKER**

Claimant

**APPEAL NO. 19A-UI-00869-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FEDERAL EXPRESS CORP**

Employer

**OC: 12/30/18**

**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 22, 2019, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on December 27, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on February 14, 2019. Claimant Evan Stalker participated. Thomas Kuiper of Equifax represented the employer and presented testimony through Tracie Bjornson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Evan Stalker was employed by Federal Express Corporation (FedEx) as a full-time courier from 2015 until December 26, 2018, when Tracie Bjornson, Operations Manager, in consultation with a human resources manager, discharged Mr. Stalker from the employment. On December 18, 2018, Mr. Stalker acted in a belligerent, aggressive, and threatening manner while collecting freight from FedEx customer Country Maid. Mr. Stalker was upset by the amount of freight to be collected. The customer had cleared the freight shipment with FedEx management prior to Mr. Stalker's arrival at the customer's place of business. While Mr. Stalker collected the freight

from the customer's dock area, he engaged in a prolonged, vulgar tirade, during which tirade he repeatedly uttered offensive and abusive language and directed such language at multiple Country Maid employees. At the same time as the prolonged tirade, Mr. Stalker aggressively and haphazardly threw the 50 pieces of the Country Maid shipment into his FedEx truck. Mr. Stalker behaved in such an aggressive manner that a male Country Maid dock worker was in fear of being assaulted by Mr. Stalker and left the dock area for that reason. While Mr. Stalker was on the return trip to the FedEx facility in Algona, a Country Maid representative contacted Ms. Bjornson to complain about Mr. Stalker's behavior.

Upon Mr. Stalker's return to the Algona facility, Ms. Bjornson questioned Mr. Bjornson about the incident and Mr. Stalker provided misleading information that minimized the incident. When Ms. Bjornson notified Mr. Stalker that he would be suspended from the employment while she investigated the matter, Mr. Stalker engaged in belligerent, aggressive behavior as he exited the FedEx facility that mirrored the earlier conduct at the Country Maid facility.

On the next day, Ms. Bjornson went to the Country Maid facility and interviewed Country Maid employees who interacted with Mr. Stalker on December 18. Those individuals provided consistent statements regarding Mr. Stalker's belligerence, vulgar language, and aggressive, threatening behavior the previous day. Ms. Bjornson collected written statements from the Country Maid employees. Mr. Stalker's conduct at the Country Maid facility violated the employer's written Acceptable Conduct policy. At the time of the discharge, Ms. Bjornson was aware of May 2018 allegation that Mr. Stalker had engaged in disruptive conduct that led to a written reprimand and a warning that Mr. Stalker could be discharged if he engaged in subsequent inappropriate behavior.

Mr. Stalker established an original claim or unemployment insurance benefits that was effective December 30, 2018 and received \$2,335.00 in benefits for the five weeks between January 26, 2019 and February 23, 2019. Federal Express Corporation is the sole base period employer in connection with the claim for benefits.

On January 17, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Stalker's separation from the employment. An employer representative told the deputy at the time of the fact-finding interview that the employer was choosing not to participate in the fact-finding interview. Documentation the employer submitted for the fact-finding interview and/or protest provided a cursory statement of the basis for the discharge and the policy violated, but did not provide sufficient detail to prove misconduct even if such evidence were un rebutted. Mr. Stalker provided a verbal statement to the deputy. Mr. Stalker's statement to the deputy was misleading. Mr. Stalker knowingly and intentionally mischaracterized the incident at Country Maid to make it sound like a non-event. Mr. Stalker knowingly and intentionally mischaracterized his conduct in connection with that matter and his subsequent exit from the workplace.

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

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 question of whether the use of improper language in the workplace is misconduct is nearly always a fact

question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See *Myers v Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Despite the absence of testimony from Country Maid employees, the weight of the evidence in the record establishes a suspension and discharge for misconduct in connection with employment. The weight of the evidence establishes that the employer conducted a reasonable and thorough investigation of the matter. The witness statements Ms. Bjornson collected from Country Maid employees were consistent and credibly illustrated Mr. Stalker's vulgar, offensive, and aggressive conduct at the Country Maid facility. Ms. Bjornson's testimony regarding Mr. Stalker's conduct at the FedEx facility on the same afternoon as the Country Maid event adds to the credibility and reliability of the Country Maid witness statements. Indeed, Mr. Stalker's testimony regarding his conduct as he exited the FedEx facility on December 18 lends credibility to the Country Maid witness statements. Mr. Stalker's December 18 conduct at the Country Maid facility and at the workplace was in knowing violation of the employer's written policy and demonstrated a willful and wanton disregard for the employer's interests, including the employer's interests in maintaining customers and the employer's interests in maintaining a civil work environment. Mr. Stalker is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Stalker must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Stalker received \$2,335.00 in benefits for the five weeks between January 26, 2019 and February 23, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Stalker received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The employer did not satisfy the fact-finding interview participation requirement. The employer elected not to provide a verbal statement to the deputy. The employer's documentation was insufficient to prove disqualifying misconduct in connection with the employment. However, Mr. Stalker knowingly and intentionally misled the deputy. Based on that intentional deception, Mr. Stalker is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

**DECISION:**

The January 22, 2019, reference 01, decision is reversed. The claimant was discharged on December 26, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,335.00 in benefits for the five weeks between January 26, 2019 and February 23, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/rvs