

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADAM M MASTERSON
Claimant

APPEAL NO. 15A-UI-02768-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUBURBAN CONSTRUCTION INC
Employer

OC: 10/05/14
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 February 20, 2015, reference 02, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on April 23, 2015. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Nate Hoskins represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Thirteen 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 benefits.

Whether the claimant is required to repay 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: The employer was employed as a full-time construction crew member from November 25, 2014 until January 30, 2015, when the employer discharged him from the employment in connection with a profane outburst directed at his immediate supervisor. On January 29, 2015, the employer met with the claimant for the purpose of disciplining him for disregarding the supervisor's directive

not to damage the casing on windows the claimant was installing. The claimant had destroyed the window casing and the employer incurred additional expense to provide new casing to its customer. The reprimand had also been based on the claimant engaging in disrespectful, offensive behavior directed at the supervisor, which behavior occurred in the presence of the employer's customer. The employer noted in the reprimand that the claimant had violated several written work rules. Immediately following the disciplinary meeting, the claimant confronted his supervisor. The claimant called the supervisor a "cocksucker" and a "dick." In addition, the claimant said, "Fuck this place." The next day the employer met with the claimant and discharged him from the employment. The conduct occurred in front of one or more other employees.

The claimant contacted the Appeals Bureau after the hearing record had closed and after the employer had been dismissed from the hearing. The hearing was scheduled for 9:00 a.m. The administrative law judge immediately made two attempts to return the claimant's call. The claimant did not answer either call. The administrative law judge left two messages for the claimant. At noon, the claimant again contacted the Appeals Bureau, at a time when the administrative law judge was in another hearing. The claimant has yet to provide good cause for not providing a telephone number for the hearing and for not participating in the hearing as scheduled.

The claimant established an additional claim for benefits that was effective February 8, 2015 and received \$2,270.00 in benefits for the ten-week period of February 8, 2015 through April 18, 2015.

The employer participated in the fact-finding interview. The employer provided an oral statement to the claims deputy and submitted exhibits for the fact-finding interview.

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.

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).

The patently offensive language that the claimant directed at the supervisor was a personal attack on the supervisor and on the supervisor's authority to direct the claimant's work. The claimant's conduct constituted misconduct in connection with the employment. The fact that conduct that triggered the discharge followed a similar incident the day before is an aggravating factor. That the fact that both incidents occurred in the presence of other people is an aggravating factor. The claimant 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 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2,270.00 in benefits for the ten-week period of February 8, 2015 through April 18, 2015.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The February 20, 2015, reference 02, decision is reversed. The claimant was discharged on January 30, 2015 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 ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$2,270.00 in benefits for the ten-week period of February 8, 2015 through April 18, 2015. The claimant must repay the benefits. The employer's account will be relieved of liability for benefits, including relief of liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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