

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIC A WESTVOLD

Claimant

APPEAL NO. 14A-UI-02977-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HAMMER INCORPORATED

Employer

OC: 02/02/14

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Eric Westvold filed a timely appeal from the March 6, 2014, reference 02, decision that disqualified him for benefits. After due notice was issued, a hearing was held on April 9, 2014. Mr. Westvold participated. Patti Hayes represented the employer. Exhibits One through Five and A 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: Eric Westvold was employed by Hammer Incorporated, a medical supply company, as a full-time medical equipment technician from November 2013 until February 6, 2014, when Patti Hayes, Branch Manager, discharged him from the employment. Ms. Hayes was Mr. Westvold's supervisor. An assistant manager also had authority to direct Mr. Westvold's work. Mr. Westvold came to the employment with experience as a medical equipment technician, but without experience in retail sales. Ms. Hayes had concerns about Mr. Westvold's work performance and attitude and addressed those concerns through two employee warning notices issued to Mr. Westvold on January 31, 2014 and a 90-day performance review on February 3, 2014. Mr. Westvold had concerns about the training he had received during the employment. Mr. Westvold perceived that he and another recently hired medical equipment technician were treated differently by the assistant manager. Mr. Westvold perceived that his coworker was treated favorably. Mr. Westvold perceived that the employer was unduly critical of his work performance. At the time of the January 31, 2014 meeting with Ms. Hayes, Mr. Westvold expressed his multiple concerns to Ms. Hayes. Ms. Hayes addressed her concerns with Mr. Westvold, but largely dismissed his concerns. At one point in the conversation, Ms. Hayes actually mocked Mr. Westvold by emitting an audible gasp in response to one of his concerns.

The incident that triggered the discharge occurred on February 5, 2014. On that day, the assistant manager overheard a conversation between Mr. Westvold and the other medical

equipment technician. During that conversation, Mr. Westvold said to the other tech, "It must be nice. You get help and I get sarcasm." The comment was in reference to the disparate treatment Mr. Westvold believed he received from the assistant manager. The assistant manager reported the comment to Ms. Hayes. The next day, Ms. Hayes discharged Mr. Westvold from the employment.

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.

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).

The weight of the evidence indicates that the employer had legitimate concerns about certain aspects of Mr. Westvold's work performance and that Mr. Westvold had legitimate concerns about how he was treated by those who supervised his work. The evidence fails to indicate that Mr. Westvold did not perform to the employer's satisfaction. The evidence does not indicate that Mr. Westvold engaged in a *pattern* of careless or negligent conduct that would indicate a willful and wanton disregard of the employer's interests. The evidence fails to establish that Mr. Westvold engaged in intentional misconduct. The employer's decision to discharge Mr. Westvold from the employer was triggered by a conversation between Mr. Westvold and a coworker, during which conversation Mr. Westvold commented on his working conditions as he genuinely perceived them to be. The comment was fairly mild. The comment was most likely protected speech under federal law. In any event, the comment did not rise to the level of misconduct. The evidence indicates, more than anything else, a mix of personalities that led to a bad outcome for all concerned. That conflict of personalities did not amount to misconduct on Mr. Westvold's part that would disqualify him for unemployment insurance benefits.

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

DECISION:

The Agency representative's March 6, 2014, reference 02, 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/pjs