

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

TYE L PORTER
2215 KINGS LN
PLATTSMOUTH NE 68048

KVAERNER SONGER INC
455 RACETRACK RD
WASHINGTON PA 15301

Appeal Number: 06A-UI-01157-JTT
OC: 01/01/06 R: 01
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 for Misconduct

STATEMENT OF THE CASE:

Claimant Tye Porter filed a timely appeal from the January 26, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 15, 2006. Mr. Porter participated. Superintendent Brian Lowe represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tye L Porter was employed by Kvaerner Songer as a full-time construction foreman from April 20, 2004 until January 4, 2006, when Site Manager Junior Whaley discharged him. The final incident that prompted the discharge occurred on December 30, 2005. Mr. Porter was in charge of four or five workers. One of the workers was loitering, leaning against a crane instead of working. When Mr. Porter observed for the second time that the employee was not

performing any work, Mr. Porter yelled to the employee from sixty feet away and asked the employee whether he would mind getting busy. The employee traveled toward Mr. Porter in a physically aggressive manner. When the employee was within 10 feet of Mr. Porter, the employee asked Mr. Porter, "So you wanna get jazzy?" The employee continued to come towards Mr. Porter in an aggressive manner. Mr. Porter put up his hand to stop the employee from advancing. The employee ran into Mr. Porter's hand. Mr. Porter had not advanced at all toward the employee. The two men exchanged words. Mr. Porter turned and walked away. Mr. Porter went to speak with the union steward to discuss ongoing problems with the employee's work performance and impact on the group. Mr. Porter advised the union steward that he intended to discharge the employee unless the employee was transferred before Mr. Porter returned from the holiday. After Mr. Porter left for the day, the employee in question complained to a higher-ranking foreman about Mr. Porter. The employer initiated an investigation of what had taken place between the two men. The employer collected statements from the six people who had been present at the time of the incident. Four of the six statements indicated there had been physical contact between the two men. Two of the six employees to write statements were the complaining employee and his brother. The employer did not submit testimony from the eyewitnesses or their written statements for the hearing. All witnesses to the event continue to be employed at Kvaerner Songer.

Mr. Porter had been a good worker, a dedicated employee, and had received no prior reprimands.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Porter was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 to 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).

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 employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The preponderance of the evidence in the record fails to establish misconduct on the part of Mr. Porter. Mr. Porter was the only eyewitness to the event to testify. Mr. Porter provided credible testimony regarding the proper exercise of his authority as foreman, his intentional decision not to escalate the situation, his lack of aggressive behavior, his reasonable belief that he was about to be assaulted, his limited self-defense behavior, and his quick de-escalation of the situation by walking away. The employer had the ability to present testimony or written statements from eyewitnesses to the alleged misconduct, but elected not to present such evidence. The administrative law judge concludes such testimony would have revealed deficiencies in the employer's case.

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

DECISION:

The Agency representative's decision dated January 26, 2006, reference 01, 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.

jt/pjs