

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS E WILSON
Claimant

APPEAL NO. 16A-UI-11689-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TWIN RESTAURANT DES MOINES LLC
Employer

OC: 10/09/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Douglas Wilson filed an appeal from the October 27, 2016, reference 02, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on an agency conclusion that Mr. Wilson was discharged on September 30, 2016 for violation of a known company rule. After due notice was issued, a hearing was held on November 29, 2016. Mr. Wilson participated. The employer was not available at the number the employer registered for the hearing and did not participate. Exhibit A was received into evidence.

ISSUE:

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

INDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Douglas Wilson was employed by Twin Restaurant Des Moines, L.L.C., d/b/a Twin Peaks in West Des Moines, as a full-time shift lead and line cook until on or about September 29, 2016, when the employer discharged him for alleged violation of a handbook policy in connection with an incident that occurred about a week earlier.

The incident that triggered the discharge happened in the restaurant's kitchen area in the vicinity of the cooks line and adjoining expediting "expo" window. Mr. Wilson witnessed another cook, Jose, speaking inappropriately to some female employees. Mr. Wilson told Jose that he could not speak to "the girls" like that. Jose then told Mr. Wilson, "Suck my dick." Jose pointed to his crotch. A war of words ensued. Mr. Wilson told Jose that he was not gay and not to speak to him like that. Jose responded, "Me neither." Jose then said, "I like to fight." Mr. Wilson responded, "I like to fight too—maybe one day we can go across the street and you can show me your skills." Mr. Wilson then told Jose that he was not going to argue or fight with him. Mr. Wilson then left area and pulled one of the managers, Tony Topolinski, aside to talk about the incident. Mr. Topolinski had entered the kitchen while the verbal dispute was unfolding. When Mr. Wilson spoke with Mr. Topolinski, Mr. Topolinski agreed to talk to Jose about how he spoke to the female staff members. After the kitchen blow up, Mr. Wilson and Jose went back to working together without further incident. Then a week later, Mr. Topolinski

and another manager, Jarod “Jay” Arnold, told Mr. Wilson that he was being discharged for a violation of a handbook rule. Mr. Wilson asked to know which rule he had violated, but did not receive a satisfactory answer.

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).

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).

The employer did not participate in the appeal hearing and did not present any evidence to support the allegation that Mr. Wilson was discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. The evidence in the record establishes that Mr. Wilson and a coworker engaged in a verbal dispute about a week before the discharge. Mr. Wilson responded in kind to Jose's statement that he liked to fight. Mr. Wilson included in his response a hollow invitation for Jose to demonstrate his fighting skills at some hypothetical, unspecified future point. Mr. Wilson's bluster, taken in context, did not rise to the level of a bonafide threat of violence and did not constitute misconduct in connection with the employment. The employer has failed to meet its burden of proving disqualifying misconduct in connection with the employment.

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

DECISION:

The October 27, 2016, 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/rvs