

**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**

**MERLIN D BOITMOTT
506 – 8TH ST N
HUMBOLDT IA 50548**

**VAN DIEST SUPPLY COMPANY
P O BOX 610
WEBSTER CITY IA 50595**

**Appeal Number: 04A-UI-04276-CT
OC: 03/21/04 R: 01
Claimant: Respondent (1)**

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:

Van Diest Supply Company filed an appeal from a representative's decision dated April 12, 2004, reference 02, which held that no disqualification would be imposed regarding Merlin Boitmott's separation from employment. After due notice was issued, a hearing was held by telephone on May 10, 2004. Mr. Boitmott participated personally. The employer participated by Brenda Keenan, Personnel Manager, and Lee Trask, Director of Maintenance. Exhibits One through Six were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Boitmott began working for Van Diest Supply Company on November 21, 1988. At the time of his discharge on March 25, 2004, he was working full time in waste management. The decision to discharge him was based on his use of an ethnic slur on March 24. In a conversation with his supervisor, Mr. Boitmott referred to Sandy Wijayang as a "chink." Mr. Wijayang, an individual of Asian descent, was not present at the time. There had been no prior incidents of Mr. Boitmott using racial or ethnic slurs.

Mr. Boitmott had received a written warning on May 3, 2001 when there was an altercation with a coworker. The two were arguing when the coworker pushed Mr. Boitmott, who grabbed him in response. There were no further incidents of that nature after the warning.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Boitmott was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Boitmott was discharged for referring to an Asian coworker as a "chink." The coworker was not present at the time, which would not excuse or justify Mr. Boitmott's conduct. However, he did not have a history of using racial or ethnic slurs while in the employment. Given his 15-year history with the employer and given the circumstances in which the term was used, the administrative law judge is inclined to view his conduct as an isolated instance of poor judgment. Conduct so characterized is not considered disqualifying misconduct. See 871 IAC 24.32(1).

For the reasons stated herein, the administrative law judge concludes that the employer has failed to satisfy its burden of proof in this matter. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Benefits are allowed.

DECISION:

The representative's decision dated April 12, 2004, reference 02, is hereby affirmed. Mr. Boitmott was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/s