

**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**

**BENJAMIN A ETZEL
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ANAMOSA IA 52205**

**CENTRO INC
950 N BEND DR
NORTH LIBERTY IA 52317**

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**Appeal Number: 05A-UI-07064-LT
OC: 06-05-05 R: 03
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)

Iowa Code §96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

Employer filed a timely appeal from the June 28, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 16, 2005. Claimant did participate and was represented by Todd Weimer, Attorney at Law. Employer did participate through John Pelton, Todd Boyse, and Chad Wiesenhouser. The administrative law judge took judicial notice of the administrative record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time product inspector/finisher from April 4, 2005 through June 9, 2005, when he was discharged. Coworker, Gary Turkington, harassed claimant about being on light duty and threw metal bolts at him rather than into a nearby garbage can. Claimant was

approximately 30 feet away from Turkington and the garbage can was within eight feet. Chad Wisenhouser, shift supervisor, had placed a garbage can closer to Turkington's work space on June 3 or 4, but Turkington continued to throw bolts towards claimant after that, indicating intentional conduct rather than simply tossing the bolts towards the garbage can.

One bolt was thrown with such force as to penetrate a corrugated cardboard box sitting near claimant. David Furler was present and saw Turkington throw up to four bolts at claimant and Turkington remarked to him, "Damn, I missed." Mike Beauquist also was present and offered to give a statement, which employer did not take. In frustration, claimant told Jason Braun on or about June 7 that after three weeks of putting up with Turkington's behavior without employer intervention, employer needed to control Turkington or he would "kick Gary's ass." Claimant did not make the comment to Turkington, hold up his hands, or refer to martial arts skills.

Turkington, Braun, and others who wrote statements, still work for the company but did not participate. The witness statements provided by employer were not generated until after the fact-finding interview and both are still employed but were not called as witnesses.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had notice of Turkington throwing bolts at claimant (an act of physical aggression) but did nothing other than put a garbage can closer to Turkington, and the assault with the bolts continued, employer should not have been surprised that claimant spoke out in frustration. Although it may constitute a verbal threat and might otherwise be considered misconduct, employer treated claimant and Turkington disparately by firing claimant for a verbal statement of frustration while only suspending Turkington for actually throwing metal bolts at claimant with enough force to tear a cardboard box. That was the physical assault, not claimant's verbal notice of Turkington's continued bad behavior.

Thus, employer has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning to the same degree as Turkington who received a lesser punishment for more severe behavior. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written) and reasonable notice should be given and the punishment should be meted out consistently, which was not done here. Benefits are allowed.

DECISION:

The June 28, 2005, reference 03, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kjw