

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACQUEZ M JOHNSON
Claimant

APPEAL NO. 16A-UI-09069-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MCNALLY OPERATIONS LLC
Employer

OC: 07/10/16
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 8, 2016, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on July 13, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on September 7, 2016. Claimant Jacquez Johnson did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. David Michael represented the employer and presented additional testimony through Jim "Chip" Monk and Gabriel Imel. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Department Exhibits D-1 through D-4 into evidence.

ISSUES:

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

Whether the claimant has been overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is an office supply company. Jacquez "Jay" Johnson was employed by McNally Operations, L.L.C. as a full-time delivery driver from 2013 until July 13, 2016, when David Michael, Iowa Operations Manager, discharged him from the employment. Mr. Michael was Mr. Johnson's immediate supervisor. Mr. Johnson performed his work duties from the employer's facility in Sioux City.

The conduct that factored in the discharge took place on the morning and afternoon of July 13, 2016. On the morning of July 13, Mr. Michael was walking through the employer's warehouse and noticed Mr. Johnson toss to the side some shrink-wrap that Mr. Johnson had just removed from a pallet of paper. Mr. Michael approached and asked Mr. Johnson in a civil tone and volume to throw the material in the trash. Mr. Johnson asked why he had "to do everything" and asserted that no one else had to pick up. Mr. Michael told Mr. Johnson, "Jay, I'm just asking you to throw it away." Mr. Johnson yelled back, "Motherfucker, why do I need to do it when no one else is doing it—why in the hell should I do it, nobody else does it—do I have to do it because I am the only black guy here?" Sales representative Jim "Chip" Monk was standing nearby and asked Mr. Johnson, "Why would you even play that card?" Mr. Michael decided it was best to de-escalate the situation by walking away and began to move away. Mr. Johnson said that he was going to contact "Steve," the owner. Mr. Michael said that was fine and asked Mr. Johnson if he should dial the number for Mr. Johnson. Mr. Johnson responded, "No, I'll fucking do it myself!" Throughout the contact, Mr. Michael remained calm and used a civil tone. Mr. Johnson's outburst occurred in the presence of Mr. Monk and shipping and receiving representative Gabriel Imel. Mr. Johnson continued his profane tirade even after Mr. Michael returned to his office. Mr. Monk and Mr. Imel each heard Mr. Johnson refer to Mr. Michael as a "motherfucker" and Mr. Johnson's continued assertion that Mr. Michael was always picking on Mr. Johnson. There was no merit to Mr. Johnson's assertion that Mr. Michael mistreated him or that Mr. Michael treated Mr. Johnson differently.

After the morning interaction with Mr. Johnson, Mr. Michael prepared two written reprimands to present to Mr. Johnson later in the day. One was based on Mr. Johnson's conduct that morning. The other was based on a motorist's complaint on July 12 regarding Mr. Johnson's operation of the employer's delivery van.

Toward the end of the work day on July 13, Mr. Michael summoned Mr. Johnson to the office to review the two written reprimands. Mr. Michael sat at his desk while he reviewed the two reprimands with Mr. Johnson. Mr. Johnson stood at the opposite side of Mr. Michael's desk. Mr. Johnson asked Mr. Michael what would happen if he did not sign the reprimands. Mr. Michael told Mr. Johnson that he would probably be let go from the employment. During the interaction, Mr. Michael remained calm and used a civil tone, while Mr. Johnson became increasingly louder and belligerent. Mr. Johnson yelled that he was not going to sign the reprimands. Mr. Johnson had about 20 invoices in his hand and slammed the pile of invoices down on the desk. Mr. Michael then notified Mr. Johnson that he was discharged from the employment.

Mr. Johnson established a claim for benefits that was deemed effective July 10, 2016. Mr. Johnson received \$2,330.00 in unemployment insurance benefits for the seven-week period of July 10, 2016 through August 27, 2016. On August 8, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. Johnson's separation from the employment. Mr. Michael represented the employer at the fact-finding interview.

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 evidence in the record establishes that Mr. Johnson engaged in misconduct in connection with the employment during two separate incidents on July 13, 2016. The first incident of misconduct involved Mr. Johnson calling Mr. Michael a "motherfucker" while yelling at him and later when ranting while still in the presence of other employees. All of the conduct was an attack on Mr. Michael's authority to direct the work. The second incident of misconduct occurred later in the day, when Mr. Johnson directed aggression toward Mr. Michael by slamming the invoices on Mr. Michael's desk. The conduct conveyed a threat.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Johnson was discharged for misconduct. Accordingly, Mr. Johnson is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Johnson must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2,330.00 in unemployment insurance benefits for the seven-week period of July 10, 2016 through August 27, 2016. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The August 8, 2016, reference 01, decision, decision is reversed. The claimant was discharged on July 13, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility

requirements. The claimant was overpaid \$2,330.00 in unemployment insurance benefits for the seven-week period of July 10, 2016 through August 27, 2016. The claimant is required to repay the overpayment. The employer's account is relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs