

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JUSTIN C BOZARTH
Claimant

APPEAL NO. 19A-UI-02064-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VINE VENTURES INC
Employer

OC: 01/27/19
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 March 4, 2019, reference 02, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 31, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on March 25, 2019. Claimant Justin Bozarth did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Nick Wilson represented the employer and presented additional testimony through Richard Brock Dixon. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 through 6 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

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 unemployment insurance benefits.

Whether the claimant must repay overpaid 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: Justin Bozarth was employed by Vine Ventures, Inc., doing business as Vine Tavern & Eatery in Coralville as a line cook from 2017 until January 31, 2019, when Nick Wilson, General Manager, discharged him from the employment. Mr. Bozarth's employment had been full-time until he

began a second employment at a neighboring establishment and reduced his available work hours. Daniel Widstrom, Morning Supervisor, and Gunner Shull, Evening Supervisor, were Mr. Bozarth's primary supervisors. Mr. Widstrom and Mr. Shull report to Richard Brock Dixon, Kitchen Manager. Mr. Dixon directly supervised Mr. Bozarth's work in the absence of Mr. Widstrom and Mr. Shull.

The final incident that triggered the discharge occurred on January 31, 2019. On that day, Mr. Wilson and Mr. Dixon entered the restaurant's kitchen after a managers' meeting and observed Mr. Bozarth wearing headphones while he performed his grill duties. For safety and efficiency reasons, the employer prohibits employees from wearing headphones while performing work for the employer. The policy was an established verbal policy, but not a written policy. When Mr. Wilson observed Mr. Bozarth operating the grill while wearing headphones, Mr. Wilson directed Mr. Bozarth to take the headphones off and reminded him of the work rule prohibiting headphones. Mr. Wilson then left the area with expectation that Mr. Bozarth would comply with the directive and that Mr. Dixon would ensure compliance. Instead of complying with the directive, Mr. Bozarth stated that he did not like the music that was playing. Mr. Bozarth asserted the employer "let other fucking people" wear headphones at work. Mr. Dixon responded that when the employer sees an employee wearing headphones, the employer directs the employee to take the headphones off. Mr. Bozarth became increasingly agitated and began yelling at Mr. Dixon. The yelling occurred in the presence of other employees and caught the attention of Mr. Wilson, who reentered the kitchen. Mr. Wilson directed Mr. Bozarth to stop yelling at Mr. Dixon and reminded Mr. Bozarth that Mr. Dixon was Mr. Bozarth's supervising manager. Mr. Bozarth then stated, "I am out of here—I'm leaving." Mr. Dixon told Mr. Bozarth that if he left, he would not be coming back. Mr. Bozarth had walked off the job on earlier occasions and had been allowed to return. Once Mr. Dixon told Mr. Bozarth that if he left, he would not be coming back, Mr. Bozarth stated, "I quit." Mr. Wilson responded, "That's fine. You're fired."

In making the decision to discharge Mr. Bozarth from the employment, the employer considered Mr. Bozarth's conduct on December 23, 2018. On that day, Mr. Bozarth had a disagreement with an African-American coworker. After Mr. Bozarth's shift ended, Mr. Bozarth began sending belligerent text messages to Mr. Dixon. Mr. Dixon replied that they would address the matter later. Mr. Bozarth then posted patently racist comments on his Facebook page that were directed at the African-American coworker. Mr. Bozarth wrote, "The germans [sic] had the right idea but it's not the tue [sic] Jews...ITS [sic] THE MONKEYS...ETHNIC CLEANING." The employer's written policy prohibited harassing behavior and specifically included harassing social media postings as prohibited conduct. The harassment policy was in the employee handbook the employer had provided to Mr. Bozarth early in the employment. Mr. Shull saw the offensive Facebook posts, took a photo of the posts, and brought them to Mr. Dixon's attention. In response to the December 23 conduct, the employer issued a reprimand that included a warning that future similar conduct would lead to termination of the employment. The employer also suspended Mr. Bozarth for a week. Mr. Bozarth returned to work on December 31, 2018.

Mr. Bozarth established an original claim for unemployment insurance benefits that Iowa Workforce Development deemed effective January 27, 2019 and received \$1,806.00 in benefits for six weeks between February 10, 2019 and March 23, 2019. Vine Ventures, Inc. is a base period employer in connection with the claim for benefits. On February 27, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Bozarth's separation from the employment. Nick Wilson represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

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). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See *Myers v Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record establishes a discharge based on misconduct in connection with the employment. Mr. Bozarth's January 31, 2019 conduct included violation of an established work rule that prohibited wearing headphones, an offensive outburst that was a direct challenge to the managers' authority to direct his work, and an unreasonable refusal to comply with a reasonable employer directive. The employer reasonably expected and required that Mr. Bozarth not wear headphones while operating a hot grill on the cooks' line. The headphones presented a bona fide safety issue. Mr. Bozarth's dislike of the music playing in the kitchen did not provide a reasonable basis for violating the employer's headphone policy. Mr. Bozarth's belligerence on January 31 followed egregious racist and harassing conduct on December 23, 2018. Because the evidence establishes a discharge based on misconduct in connection with the employment, Mr. Bozarth is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Bozarth 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Bozarth received \$1,806.00 in benefits for six weeks between February 10, 2019 and March 23, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Bozarth received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Bozarth is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The March 4, 2019, reference 02, decision is reversed. The claimant was discharged on January 31, 2019 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,806.00 in benefits for six weeks between February 10, 2019 and March 23, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs