

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES A MACKEY
Claimant

APPEAL NO. 06A-UI-10331-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

J F SEHR INC
JERRY'S HAULING
Employer

OC: 09/17/06 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

J F Sehr Inc., doing business as Jerry's Hauling, filed a timely appeal from the October 12, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 21, 2006. Claimant James Mackey participated and presented additional testimony through his girlfriend, Darlene Smolek, and former Jerry's Hauling employee Gordon Thomas. Owner Jerry Sehr represented the employer and presented additional testimony through Jerry's Hauling employees Jody McKillip, John Purvis, and Robert Villarreal. The administrative law judge took official notice of Agency records regarding benefits disbursed to the claimant.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: James Mackey was employed by Jerry's Hauling as a full-time dump truck driver until September 18, 2006, when owner Jerry Sehr discharged him. The final incident that prompted the discharge occurred on the morning of September 18. Shortly after Mr. Mackey arrived for work, Mr. Sehr called the shop from his cell phone and asked what Mr. Mackey and the other employees were doing. Mr. Mackey indicated that he and the other employees had been performing routine maintenance on the employer's dump trucks. Mr. Mackey also stated that the employees had been waiting for Mr. Sehr to find them "some fucking work." Mr. Sehr told Mr. Mackey that he did not like his attitude and told Mr. Mackey to get his things and go home. Both Mr. Sehr and Mr. Mackey understood at the time that Mr. Sehr's comments were intended to discharge Mr. Mackey from the employment. Mr. Mackey was preparing to leave and to take an ill coworker home when Mr. Sehr arrived at the workplace. Mr. Sehr approached Mr. Mackey and asked whether he had mistaken Mr. Mackey's attitude during the telephone call. Mr. Mackey indicated he believed Mr. Sehr had in fact mistaken his attitude. At that point, Mr. Sehr walked into the shop and Mr. Mackey departed with the sick coworker.

On September 14 or 15, Mr. Sehr had told Mr. Mackey he was discharged. Mr. Sehr had instructed Mr. Mackey to use a different wrench to work while Mr. Mackey worked on a truck. Mr. Mackey threw the wrench he had been using. When Mr. Sehr told Mr. Mackey to get out, Mr. Mackey apologized and pleaded to be allowed to continue in the employment. Mr. Sehr rescinded the discharge and allowed Mr. Mackey to continue in the employment.

The work environment and working relationships were disorderly, dysfunctional, and rife with abusive behavior. Mr. Sehr was in the habit of directing abusive epithets at his employees. These included referring to employees as “fucking idiots.” Mr. Sehr allowed employees to direct abusive epithets at one another. Mr. Sehr and Mr. Mackey were both in the habit of throwing tantrums. The relationship between Mr. Sehr and Mr. Mackey blurred the boundaries between the employer-employee relationship and personal relationship. Mr. Mackey’s use of profanity on the morning of September 18 occurred in this context. Both Mr. Sehr and Mr. Mackey understood that Mr. Mackey needed the employment and that Mr. Sehr needed Mr. Mackey as an employee, but both engaged in conduct that undermined the employment relationship. Two days after the discharge, Mr. Sehr contacted Mr. Mackey to see whether Mr. Mackey was willing to return to the employment. Despite his financial need, Mr. Mackey was unwilling to return without a significant change in the working conditions.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Mackey was discharged for misconduct in connection with the employment. It does not.

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.

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).

The evidence in the record indicates a work environment where decency and civility were largely absent and where profanity or offensive language or conduct were standard operating procedure. In the context of the particular work environment, the administrative law judge concludes that Mr. Mackey's utterance of September 18 did not constitute a willful or wanton disregard of the employer's interests or substantial misconduct. For the same reasons, the administrative law judge further concludes that the wrench-throwing incident also did not constitute substantial misconduct. Though the decision to discharge Mr. Mackey was within the discretion of the employer, the administrative law judge concludes, under the specific facts of this case, that Mr. Mackey was not discharged for misconduct that would disqualify him for unemployment insurance benefits. Mr. Mackey is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Mackey.

DECISION:

The Agency representative's October 12, 2006, reference 01, decision is affirmed. 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/kjw