IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CARL TERRELL
Claimant

TOTAL SOURCE MOLDERS INC
Employer

APPEAL NO. 13A-UI-12086-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/06/13
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 24, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 18, 2013. Claimant Carl Terrell participated. Bob Lord represented the employer. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant.

The parties stipulated that the employer participated in the fact-finding interview that led to the October 24, 2013, reference 01, decision that allowed benefits.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Carl Terrell was employed by Total Source Molders, Inc., as a full-time machine operator from 2010 until October 4, 2013, when Bob Lord, General Manager, discharged him from the employment for alleged violation of the employer's workplace violence policy.

The incident that triggered the discharge occurred on October 3, 2013. Mr. Terrell had agreed to work voluntary overtime that evening. Mr. Terrell then overslept and reported late for the voluntary overtime. During the shift, another employee, Kayla Schlotterbach reported to Chris Knepp, Second Shift Supervisor, that Mr. Terrell had threatened a coworker, Jeff Stoneking. Mr. Terrell had heard a rumor that day, from M. Schlotterbach, that he was about to be discharged from his employment. Mr. Stoneking had been identified as the source of that rumor. Mr. Terrell had recently begun an attempt to unionize the workplace. The conduct had come to the employer's attention and the employer had interviewed some employees, Including

Mr. Stoneking, about cards Mr. Terrell had been distributing to employees as part of his attempt to unionize the workplace. Mr. Terrell had met with the employer on October 2 and 3 and all parties present, including Mr. Terrell, thought the meetings went well. Mr. Terrell had decided to abandon his attempt to unionize the workplace.

During the evening shift on October 3, Mr. Terrell approached Mr. Stoneking. Mr. Terrell told Mr. Stoneking to shut his fucking mouth or he would shut it for him and to watch his ass outside of work. Mr. Terrell told Mr. Stoneking that he, Mr. Terrell, had pulled the plug on the union, that it was over, water under the bridge, and to let it go. Ms. Schlotterbach heard the threat and reported the threat to Chris Knepp, Second Shift Supervisor. The employer viewed Mr. Terrell's reported utterance as a credible threat and escorted Mr. Stoneking to his vehicle. Mr. Knepp reported the matter to Bob Lord, General Manager.

At about the same time the employer made certain that Mr. Stoneking got to his car without incident, Mr. Knepp came to get Mr. Terrell for a meeting with Mr. Lord. During the meeting, Mr. Lord told Mr. Terrell that he could smell alcohol on Mr. Terrell's breath. Mr. Terrell denied that he had been drinking. Mr. Lord decided to terminate the conversation, send Mr. Terrell home and speak with Mr. Terrell the next morning. The employer does not engage in alcohol testing of employees and did not ask Mr. Terrell to submit to a breath alcohol test. The employer concluded that Mr. Terrell was acting out of character and further concluded that Mr. Terrell must be under the influence of alcohol. The next morning, Mr. Lord discharged Mr. Terrell from the employment for threatening Mr. Stoneking. The employer had a written policy that prohibited acts of violence, including threats of violence, in the workplace. The policy was in the employee handbook that the employer had provided to Mr. Terrell.

Mr. Terrell established a claim for benefits that was effective October 6, 2013 and received $980.00 in benefits for the period of October 6, 2013 through November 2, 2013.

REASONING AND CONCLUSIONS OF LAW:

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).

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).

Despite the employer's failure to present witness testimony from Mr. Stoneking or Ms. Schlotterbach, there is sufficient evidence in the record to establish that Mr. Terrell did indeed threaten Mr. Stoneking at work on the evening of October 3, 2013. Part of that evidence comes from Mr. Terrell's testimony that he told Mr. Stoneking to shut his mouth. Part of the evidence of a threat derives from the written statements that the employer obtained from Ms. Schlotterbach and others. Mr. Terrell testified that Ms. Schlotterbach and Mr. Stoneking were his friends. Such testimony supports the reliability of the hearsay written statements, insofar as Mr. Terrell's purported workplace friends were sufficiently afraid of him on October 3 that they reported his threat to a supervisor. Mr. Terrell conceded during his testimony that his conduct on October 3 was outside his usual character. Part of the evidence supporting the conclusion that Mr. Terrell did indeed utter a threat to Mr. Stoneking derives from Mr. Terrell's noteworthy conduct during the appeal hearing, which conduct can best be described as exceedingly aggressive and challenging. At several points in the hearing, Mr. Terrell attempted to commandeer the hearing. When the administrative law judge explained the problem with the record that was being made, Mr. Terrell repeatedly interrupted, offered a feigned apology, and continued on in the same vein. When the employer attempted to question Mr. Terrell, Mr. Terrell engaged in the same disruptive behavior, repeatedly cutting the employer off despite

the administrative law judge's directives that he stop. Mr. Terrell's conduct during the hearing opened a window on what his conduct had most likely been on October 3 under circumstances where he was freer to impose his will on Mr. Stoneking.

The administrative law judge concludes that the employer has presented insufficient evidence to establish that Mr. Terrell was under the influence of alcohol on October 3.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Terrell was discharged for misconduct. Accordingly, Mr. Terrell is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Terrell.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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 $980.00 in benefits for the period of October 6, 2013 through November 2, 2013. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The agency representative's October 24, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. 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 allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant was overpaid $980.00 in benefits for the period of October 6, 2013 through November 2, 2013. The claimant must repay that amount to Workforce Development.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs