IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JEFF R BREWER Claimant **BARREL HOUSE DUBUQUE LLC** Employer	**APPEAL NO. 19A-UI-07842-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/01/19** **Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code Rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 27, 2019, reference 02, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on September 4, 2019 for misconduct in connection with the employment. After due notice was issued, a hearing was held on October 28, 2019. Claimant Jeff Brewer participated. Lara Farr represented the employer and presented additional testimony through Paul Martinez.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeff Brewer was employed by Barrel House Dubuque, L.L.C., as a full-time Assistant Manager until September 4, 2019, when the employer discharged him from the employment. Michael Goodwin, General Manager, was Mr. Brewer's immediate supervisor. Mr. Goodwin reports to Paul Martinez, Director of Front of House Operations. Mr. Martinez oversees operations at all five of the employer's restaurants. The incident that triggered the discharge occurred on August 9, 2019. On that day, Mr. Brewer burnt his hand on a pizza pan he did not expect to be hot. Mr. Brewer erupted in anger and directed several offensive, abusive and profane epithets at the cook responsible for the placing of the hot pizza pan in the restaurant's expediting window. Mr. Brewer called the subordinate a "retard," a "fucking idiot," a "fucking coke head," and "fucking stupid." In addition, Mr. Brewer challenged the employee responsible for the hot pizza pan to "go do another fucking line up your nose." Mr. Brewer's outburst occurred in the presence of multiple employees, including those immediately present and those within earshot. Mr. Brewer's conduct violated the employer's harassment policy. Mr. Brewer was at all relevant

times aware of the harassment policy. As an assistant manager, Mr. Brewer was charged with assisting with enforcement of the employer's policies, including the harassment policy.

At some point subsequent to the August 9 incident, one or more employees brought the matter to the attention of Mr. Goodwin, the General Manager. Mr. Goodwin did not speak with Mr. Brewer about the matter. Mr. Goodwin waited until August 25, 2019 to bring the matter to the attention of Mr. Martinez. On August 25, Mr. Martinez commenced an investigation of the August 9 incident. On August 27, September 1, and September 3, Mr. Martinez received written statements from three witnesses who had been present for the August 9 incident. On September 4, 2019, Mr. Martinez met with Mr. Brewer in the presence of Mr. Goodwin and notified Mr. Brewer that he was being discharged for violating the employer's harassment policy. This was the first time the employer spoke with Mr. Brewer regarding the August 9 incident. In making the decision to discharge Mr. Brewer from the employment, the employer considered an earlier incident wherein Mr. Brewer added an unauthorized $50.00 charge to a patron's check as part of a purported joke.

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).

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).

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 871-24.32(4).

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).

The employer presented insufficient evidence to prove a discharge that was based on a *current act.* The incident and conduct that triggered the discharge occurred on August 9, 2019. Though Mr. Martinez only learned of the conduct from Mr. Goodwin on August 25, 2019, Mr. Goodwin clearly knew of the conduct and incident at an earlier point. The employer is unable to say when Mr. Goodwin first learned of the conduct. Mr. Goodwin elected not to address the matter with Mr. Brewer. Mr. Goodwin elected to delay bringing the matter to Mr. Martinez's attention until August 25, 2019. The employer then further delayed addressing the matter with Mr. Brewer until September 4, 2019. The weight of the evidence establishes unreasonable delay on the part of the employer, measured from the unspecified date when Mr. Goodwin learned of the August 9 incident to the employer's September 4 meeting with Mr. Brewer. Because the evidence fails to establish a *current act*, the administrative law judge concludes that Mr. Brewer was discharged for no disqualifying reason. Because the discharge was not based on a current act, the administrative law judge need not further consider the August 9, 2019 or the earlier incident. Mr. Brewer is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 27, 2019, reference 02, decision is reversed. The claimant's September 4, 2019 discharge was not based on a current act. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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