

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EVELYN BULGER
Claimant

APPEAL NO. 08A-UI-09844-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 09/21/08 R: 02
Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated October 14, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 10, 2008. The claimant participated. Participating on behalf of the claimant was her designated representative, Charles Shields. The employer participated by Eddie Brown and Rich Angus. Exhibits One through Eight were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from January 13, 1997 until September 22, 2008 when she was discharged from employment. Ms. Bulger held the position of full-time environmental service worker and was paid by the hour. Her immediate supervisor was Rich Angus.

The claimant was discharged based upon an incident that occurred on September 13, 2008 in the hospital cafeteria. At that time Ms. Bulger was confronted by an angry female worker who confronted Ms. Bulger, pointing a finger in Ms. Bulger's face. Ms. Bulger slapped the other worker's hand away and in turn the other worker slapped the claimant. Ms. Bulger then pushed the other female worker away. Although the claimant had the opportunity to retreat from the situation at that time, the parties remained in the area exchanging inappropriate statements to each other. Ms. Bulger engaged in the use extremely foul and repetitive language directed towards the other worker. These statements were made in the presence of other individuals in the cafeteria area and were embarrassing and disruptive. A number of workers in the area immediately reported Ms. Bulger's conduct to hospital management. As a result of the incident, both Ms. Bulger and the other employee were discharged from employment.

It is the claimant's position that she did not walk away from the incident because she had been assaulted.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Bulger was discharged for misconduct in connection with the employment. It does.

The evidence in the record establishes that although the incident in question was initiated by the other female worker and both parties engaged in physical contact, the evidence also establishes that Ms. Bulger had the opportunity to retreat from the confrontation or at a minimum to stop any further interaction with the other worker once the physical exchange between the parties had subsided. The evidence in the record establishes that instead, Ms. Bulger remained in the area and engaged in the use of extremely vulgar and inappropriate language and was immersing and upsetting to staff and patrons who were in the open cafeteria area. The comments of Ms. Bulger were not designed to ward off any further confrontation or exchange from the other worker but designed as a personal verbal attack that was unnecessary and inappropriate under the circumstances.

Because of the hospital's strict policy on violence or the threat of violence in the workplace and the unusual vile and inappropriate statements made by the claimant in public, a decision was made to terminate Ms. Bulger from her employment.

While it is understandable that the claimant may have acted in self defense and may have made statements to the other worker to ward off a further attack, the claimant's extended and repetitive use of the vile language in this case was a disregard of the employer's reasonable standards of behavior and interests. The administrative law judge therefore concludes that the claimant's discharge was for misconduct in connection with her work.

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.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to section 602.10101.

DECISION:

The representative's decision dated October 14, 2008, reference 01, is reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided that she is otherwise eligible. The administrative law judge remands the issue of a potential overpayment of benefits to the Claims Division for a

determination as to whether there has been an overpayment, the amount and whether the claimant will have to repay the benefits.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

css/css