

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TAYLOR M WORRALL

Claimant

APPEAL NO. 18A-UI-11363-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC C/O ADP UCM

Employer

OC: 10/21/18

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 14, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on September 6, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 6, 2018. Claimant Taylor Worrall participated. Chad Miller represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. 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 and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with 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 employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Taylor Worrall was employed by Blazin Wings, Inc., d/b/a Buffalo Wild Wings, as a part-time server. Ms. Worrall worked at the employer's Dubuque restaurant. The employment began in 2014 and ended on September 6, 2018, when Aaron Kurt, General Manager, discharged her for alleged violence in the workplace. The incident that triggered the discharge occurred at the workplace on September 6, 2018. On that day, Ms. Worrall was a closing employee and was designated to ensure that servers "cut" earlier in the evening performed their "cut work" prior to leaving the workplace. Devan Siegert was one such employee. When Ms. Siegert asked Ms. Worrall to authorize her to leave, Ms. Worrall declined to do so because Ms. Siegert had not performed her "cut work." Ms. Worrall returned to her server duties, but heard from a bartender that Ms. Siegert was making a fuss about Ms. Worrall not authorizing her to leave. Ms. Worrall spoke to Ms. Siegert and attempted to explain that everyone was assigned cut work and had to

perform the cut work. Ms. Siegert asserted that Ms. Worrall did not do her share. Ms. Worrall explained that she did ample closing work after the other employees have been cut from the schedule. When Ms. Siegert continued to press the issue, Ms. Worrall suggested that they move the discussion to the kitchen so that they were not arguing in front of customers. The pair made their way to the kitchen and continued the argument as they went. The heated exchange continued in the kitchen. Shift Supervisor Stephanie Webster was present, but did not immediately intervene. During the heated exchange, Ms. Siegert stated that Ms. Worrall was a “lazy bitch” and that a manager should intervene before Ms. Siegert fought “a pregnant bitch.” Ms. Worrall was pregnant at the time of the incident. Ms. Webster eventually stepped between Ms. Siegert and Ms. Worrall. Ms. Worrall returned to her duties. About an hour later, Ms. Worrall was summoned to a meeting with Mr. Kurt. Mr. Kurt told Ms. Worrall that she was discharged from the employment for pushing Ms. Siegert and Ms. Webster. Ms. Worrall had pushed neither person. Ms. Worrall asked Mr. Kurt to review the video surveillance record of the interaction. Mr. Kurt stated, “What’s done is done”

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).

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).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995).

The weight of the evidence fails to establish that Ms. Worrall engaged in misconduct in connection with the employment. The employer did not present testimony from anyone with personal knowledge of the incident that triggered the discharge. The employer representative and sole witness lacked personal knowledge concerning the matter that triggered the discharge and was not with the company at the time of the incident. The employer presented insufficient evidence to rebut Ms. Worrall's testimony concerning the incident that triggered her discharge. While the evidence indicates an error in judgment on the part of Ms. Worrall when she elected to continue her participation in the argument with Ms. Siegert, the evidence does not support the employer's assertion that Ms. Worrall pushed Ms. Siegert or Ms. Webster. The weight of the evidence does not indicate that Ms. Worrall made any threats of violence or that she used offensive language when interacting with Ms. Siegert.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Worrall was discharged for no disqualifying reason. Accordingly, Ms. Worrall is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The November 14, 2018, reference 01, decision is affirmed. The claimant was discharged on September 6, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs