

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY L ROUTH
Claimant

APPEAL NO. 16A-UI-10738-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

OC: 09/11/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Ashley Routh filed a timely appeal from the September 30, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Ms. Routh was discharged on September 8, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on October 17, 2016. Ms. Routh participated. Mark Paulsen represented the employer and presented additional testimony through Carla Smith.

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: Ashley Routh was employed by ABCM Corporation as a full-time Certified Nursing Assistant (CNA) at Westview Care Center in Indianola from 2003 until September 8, 2016, when Carla Smith, Director of Nursing, discharged her from the employment. On September 7, 2016, Ms. Routh initiated multiple inappropriate, vulgar discussions in the workplace in the presence of dependent adult residents and other staff. Ms. Routh repeatedly brought up a recent ménage-a-trois in which she had been a participant. Ms. Routh used profanity and other vulgar language when speaking of that incident and other planned sexual exploits. Ms. Routh repeatedly solicited information from other CNAs regarding whether they too had engaged in such exploits. In connection with the same utterances, Ms. Routh also bragged about illegal drug use and solicited information from other CNAs regarding whether they too had engaged in illegal drug use. The other staff members were keenly aware of the inappropriateness of the utterances, especially in light of the fact that several of the utterances were made in the immediate presence of residents/patients. The other staff attempted to get Ms. Routh to cease

the utterances. Ms. Routh continued with the utterances nonetheless. Three different staff members reported the conduct to Ms. Smith on September 8. Two of the complaining staff members were friends with Ms. Routh outside of work. Each complaining staff member provided Ms. Smith with an independent written statement that corroborated the other two staff members' statements concerning Ms. Routh's conduct.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 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).

While the employer's evidence consisted mostly of hearsay, the administrative law judge found that evidence to be credible and reliable. The employer relied upon information provided by three different concerned employees, two of whom Ms. Routh identifies as friends outside of work. The weight of the evidence establishes that Ms. Routh completely disregarded the interests of the employer, fellow staff members, and, most importantly, the dependent adults in her care, when she repeatedly subjected them to vulgar monologues concerning her sexual exploits and illegal drug use.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Routh was discharged on September 8, 2016 for misconduct in connection with the employment. Accordingly, Ms. Routh is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Routh must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The September 30, 2016, reference 01, decision is affirmed. The claimant was discharged on September 8, 2016 for misconduct in connection with the employment. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs