

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA K COTHER
Claimant

APPEAL NO. 07A-UI-10400-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOUSCHER FAMILY DENTISTRY LLC
Employer

OC: 05/13/07 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Angela Cother filed a timely appeal from the November 6, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on November 29, 2007. Ms. Cother participated. Kate Samp, Office Manager, represented the employer. Exhibits One through Six were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Angela Cother was employed by Louscher Family Dentistry as a full-time receptionist from June 25, 2007 until October 15, 2007, when Office Manager Kate Samp advised her that the dentists had decided to discharge her.

The incident that prompted the discharge occurred on October 12, 2007. Ms. Cother had checked in a patient who was to be seen by Dental Hygienist Angie Weiland. Ms. Weiland was at the front desk when the patient arrived and Ms. Cother had informed Ms. Weiland that the patient in question was Ms. Wieland's next patient. When Ms. Weiland left the reception area, Ms. Cother assumed that Ms. Weiland had gone back to make certain the treatment room was in order and that Ms. Weiland would return to the reception area to retrieve the patient. Ms. Cother waited approximately 15 minutes for Ms. Weiland to collect the patient. Ms. Cother could see that the patient was getting frustrated with the wait. Ms. Cother went looking for Ms. Weiland and located her in the break room eating pizza with other staff. Ms. Cother advised Ms. Weiland that the patient had been waiting for an extended period. Ms. Weiland responded that she would get to the patient when she was ready. Ms. Weiland told Ms. Cother that Ms. Cother was rude. Ms. Cother apologized and returned to her work area. Ms. Cother had not used any profanity or offensive language. The volume of Ms. Cother's voice rose to the level of Ms. Weiland's voice after Ms. Weiland told Ms. Cother she was rude. However, neither person was yelling.

Ms. Cother continued to be upset by the encounter and spoke to Office Manager Kate Samp about the incident. Ms. Cother confirmed that her job was to assist in keeping the dentists and hygienists on schedule and confirmed that it was appropriate for her to notify Ms. Weiland that the patient was waiting. Ms. Cother was able to calm herself and complete her shift. Ms. Cother had further dealings with Ms. Weiland later in the shift and conducted herself appropriately during those interactions. Ms. Weiland conceded during the later contact that the patient had been agitated about the wait.

Ms. Samp investigated the incident during the next few days by obtaining verbal statements from Ms. Weiland and three other people who had been present in the break room. Dr. Jessica Corcoran had been present for the incident. Dr. Corcoran advised Ms. Samp that she could not work with a person who raised her voice and that she thought Ms. Cother should be discharged. Ms. Samp then recommended to the dentists that Ms. Cother be discharged from the employment. Ms. Samp carried out the discharge on Monday, October 15. Ms. Cother was at or near the end of her 90-day probationary employment at the time of the discharge.

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).

An employer has the right to expect decency and civility from its employees. Use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. 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).

This case differs significantly from the Myers case. Ms. Cother did not use any profanity or patently offensive language when addressing Ms. Weiland. Ms. Cother did not engage in any name calling. Ms. Cother did not yell at Ms. Weiland. The evidence indicates that the employer had a very low tolerance for any interpersonal conflict or expression of frustration. The evidence indicates that Ms. Cother and Ms. Weiland each demonstrated poor judgment during the brief break room exchange. The evidence does not demonstrate any conduct on the part of Ms. Cother that rises to the level of misconduct. While the decision to discharge Ms. Cother from the employment was within the discretion of the employer, the administrative law judge concludes that Ms. Cother was not discharged for misconduct in connection with the employment that would disqualify her for unemployment insurance benefits. Accordingly, Ms. Cother is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Cother.

The administrative law judge notes that this employer is not a base period employer for purposes of benefits paid to Ms. Cother during the current benefit year, which commenced on May 15, 2007 and which will end on May 14, 2008. Accordingly, the employer’s account would only be assessed for benefits paid to Ms. Cother if Ms. Cother establishes a new claim for benefits on or after May 14, 2008 and is then deemed eligible for benefits.

DECISION:

The Agency representative's November 6, 2007, reference 02, decision is reversed. The claimant was discharged 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/pjs