

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHERECE R ARMSTRONG**  
Claimant

**APPEAL NO. 14A-UI-02342-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABRH LLC**  
Employer

**OC: 02/02/14**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 20, 2014, reference 02, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on March 25, 2014. Claimant Cherece Armstrong participated. Tom Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Jenn Moeller, Steve Tetter, and Tara Davis. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim that was effective February 2, 2014. Exhibits One through Four, Seven and Eight were received into evidence.

**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: Cherece Armstrong was employed by ABRH, L.L.C., d/b/a Village Inn as a part-time server from March 2013 until November 30, 2013, when Jenn Moeller, Associate Manager, discharged her from the employment for assaultive behavior, threats of assaultive behavior and profanity, all in violation of the employer's written policy.

The incident that triggered the discharge occurred during the evening shift on November 29, 2013. During the shift, Ms. Armstrong became upset that fellow server Tara Davis had left broken glass on the floor. Ms. Davis had accidentally broke the glass and had been called away to assist another employee with entering an order. Ms. Davis went to help the fellow server, Melanie Flores, and left the glass for when she was done helping Ms. Flores. While Ms. Davis was assisting Ms. Flores with entering the order on the computer located in the dining room of the restaurant, Ms. Armstrong approached the pair. Ms. Armstrong asked Ms. Davis whether she was going to clean up the broken glass. Ms. Davis told Ms. Armstrong that she was in the middle of something and would get to it. Ms. Armstrong insisted that Ms. Davis clean

up the glass immediately. Ms. Davis said that she was helping a server with helping a guest and would get to it. Ms. Armstrong told Ms. Davis that she needed to do her job and to “get your butt back there and get it done.” Ms. Davis told Ms. Armstrong not to worry about it and that she would get to it in a second. At that point, Ms. Armstrong grabbed Ms. Davis’ face and pushed Ms. Davis. Ms. Davis grabbed Ms. Armstrong’s wrist to remove Ms. Armstrong’s hand from her face. Ms. Armstrong then left the area. Ms. Davis immediately reported the incident to the manager on duty, Steve Tetter, Assistant Manager. Mr. Tetter had been helping a guest nearby at the time of the incident and had heard Ms. Armstrong becoming loud in the dining room. Mr. Tetter did not see Ms. Armstrong grab Ms. Davis, but observed Ms. Davis leaning in toward Ms. Davis in an aggressive manner. Mr. Tetter told Ms. Davis to stay away from Ms. Armstrong.

Immediately after Ms. Davis reported the incident to Mr. Tetter, Mr. Tetter questioned Ms. Flores about what she had observed. Mr. Tetter then followed Ms. Armstrong into the kitchen area. When Mr. Tetter asked Ms. Armstrong whether she had put her hands on Ms. Armstrong, Ms. Armstrong became loud and belligerent. Ms. Armstrong asserted she had put her hands on Ms. Davis because Ms. Davis had put her hands on Ms. Armstrong. That was not true. Ms. Armstrong continued to yell as she referred to Ms. Davis as a bitch, stupid white bitch, and slut. Ms. Armstrong repeatedly yelled these things about Ms. Davis. Ms. Armstrong added that she was going to punch Ms. Davis. Mr. Tetter told Ms. Armstrong that she was “off the floor” and to finish her side work and go home. Ms. Armstrong became even more belligerent as she moved to an area closer to customers. Ms. Armstrong said that she was “going to punch that bitch” and “fuck this place.” Ms. Armstrong added, “You’re all a bunch of bitches and whores.” Ms. Armstrong told Ms. Davis that she was a “fucking bitch” and told others she was going to “punch that stupid bitch in her face.” Because Ms. Armstrong continued to be aggressive and belligerent, Mr. Tetter had Ms. Davis step into the office to ensure her safety. Mr. Tetter then told Ms. Armstrong to leave. After Ms. Armstrong left, a customer complained to Mr. Tetter about Ms. Armstrong’s language and conduct. After Ms. Armstrong left, Mr. Tetter had the servers who had been present that evening provide written statements concerning the conduct they had observed. Mr. Tetter left a memo for Ms. Moeller in a manager communications book.

When Ms. Armstrong arrived the next day, Ms. Moeller notified her that the employment was done based on Ms. Armstrong’s assaultive behavior. The employer’s employee handbook contained a conduct policy that prohibited “any conduct that limits an individual’s effectiveness as an employee which creates risk of harm or loss or actual harm or loss to another person, the business or reputation of the company.” The policy specifically included assault, attempted assault, threats of violence, and abusive behavior as prohibited conduct. Ms. Armstrong had received a copy of the employee handbook at the start of her employment.

#### **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) alone. 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).

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 evidence in the record establishes misconduct in connection with the employment based on Ms. Armstrong's belligerent, offensive and assaultive behavior on November 29, 2013. The weight of the evidence establishes that Ms. Armstrong's version of events is not credible. The employer's testimony concerning Ms. Armstrong's conduct was consistent amongst the witnesses and consistent with the written statements prepared in close proximity to the incident that triggered the discharge. Some of the written statements that documented the assaultive and threatening behavior were from coworkers with whom Ms. Armstrong indicates she had a good working relationship. The weight of the evidence indicates that Ms. Armstrong did indeed assault Ms. Davis in the workplace on November 29, 2013. The evidence further indicates that Ms. Armstrong made several threats to Ms. Davis and about Ms. Davis. The evidence further indicates that Ms. Armstrong repeatedly directed vulgar and offensive language at Ms. Armstrong and did so in the vicinity of guests and multiple staff members. The language, the threats, and the assaultive behavior each establishes a separate basis for a finding of misconduct.

Because Ms. Armstrong was discharged for misconduct, she is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Armstrong.

Because there has been no payment of benefits in connection with the claim that was effective February 2, 2014, there are no overpayment issues to be addressed.

**DECISION:**

The Agency representative's February 20, 2014, reference 02, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs