

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA L CAIN
Claimant

APPEAL NO. 16A-UI-08372-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ANIMAL LIFELINE OF IOWA INC
Employer

OC: 07/03/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Diana Cain filed a timely appeal from the July 25, 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. Cain had been discharged on June 30, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on August 18, 2016. Ms. Cain participated and presented additional testimony through Tim Hall. Martha Wittkowski, Executive Director, represented the employer. Exhibits One through Four and A were received into evidence.

ISSUE:

Whether Ms. Cain 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: Diana Cain was employed by Animal Lifeline of Iowa, Inc., as a part-time sales clerk at the employer's thrift shop from January 2015 until June 30, 2016, when Martha Wittkowski, Executive Director, discharged her from the employment. Ms. Cain's work duties included pricing merchandise, putting merchandise on the sales floor, keeping the store neat and orderly, and assisting customers and donors. Ms. Cain's immediate supervisor was Kevin Carroll, Thrift Shop Manager. Mr. Carroll notified Ms. Cain of the discharge and delivered a discharge memo that indicated as follows:

This is to inform you that, effective immediately, your employment with Animal Lifeline of Iowa is being terminated.

This action is being taken based on your unacceptable performance and unprofessional treatment of your co-workers and volunteers. In addition, you were two hours late in reporting for your shift on Wednesday, June 29 and you did not call me to inform me [Kevin Carroll] that you would be late. This constitutes [sic] a no show, no call and will not be tolerated.

We strive to provide a friendly environment for our staff, volunteers and customers and your behavior does not meet with the standards we have established.

The incident that triggered the discharge involved Ms. Cain's shift on June 29, 2016. On that day, Ms. Cain arrived late for work because she had overslept. Ms. Cain or her husband notified a coworker that Ms. Cain would be late, but did not contact Mr. Carroll. Ms. Cain decided not to notify Mr. Carroll because it was his day off. The employer alleges that during the shift that day, Ms. Cain directed vulgar and belligerent comments at an AARP-affiliated senior who was helping at the store as part of an AARP-sponsored employment program. Ms. Cain denies the allegation. During the shift on June 29, Ms. Cain contacted Mr. Carroll with a concern about one of the AARP workers, but not the one the employer alleges Ms. Cain mistreated. During the shift, AARP program representatives arrived to speak with Ms. Cain, but Ms. Cain declined to engage in contact with them. Ms. Cain alleges that the AARP representatives were being belligerent and that is the reason she declined to speak with them. The AARP representatives spoke with Mr. Carroll and Mr. Carroll relayed information to Ms. Wittkowski. AARP threatened to remove its workers from the Animal Lifeline Thrift Shop in response to Ms. Cain's alleged mistreatment of its participant. Ms. Wittkowski did not speak with the AARP personnel. Animal Lifeline relies heavily on volunteer labor. Ms. Wittkowski discharged Ms. Cain to preserve the agency's relationship with the AARP program.

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). 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). 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).

Excessive unexcused absences constitute a form of misconduct in connection with the employment. Iowa Administrative Code rule 871-24.32(7).

The employer presented insufficient evidence and insufficient direct and satisfactory evidence to meet its burden of proving by a preponderance of the evidence that Ms. Cain mistreated the AARP worker on June 29, 2016. The employer elected not to present testimony from anyone with personal knowledge of the matter. The employer had the ability to present such testimony. The employer presented insufficient evidence to rebut Ms. Cain's assertion that she did not mistreat the AARP worker. The employer provided an unsworn written statement collected from the AARP worker about a couple weeks after Ms. Cain was discharged from the employment.

That letter is insufficient to rebut Ms. Cain's sworn testimony. Ms. Cain's single unexcused absence is insufficient to establish misconduct in connection with the employment.

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

DECISION:

The July 25, 2016, reference 01, 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