IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAMELA C ASCHBRENNER
Claimant

THE TJX COMPANIES INC
Employer

APPEAL NO. 13A-UI-09401-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/14/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Pamela Aschbrenner filed a timely appeal from the August 5, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 29, 2013. Ms. Aschbrenner participated. The employer received appropriate notice of the hearing, but did not participate in the hearing. At 4:06 p.m. on the day before the hearing, Equifax faxed a request to move the hearing from 11:00 a.m. to 1:00 p.m. The employer representative indicated that the basis of the request was that the 11:00 a.m. hearing time was two hours before the employer's store manager's scheduled start time. The administrative law judge denied the postponement request for lack of good cause shown and because the request was untimely.

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: Pamela Aschbrenner was employed by The TJX Companies, Inc., d/b/a TJ Maxx, as a full-time floor coordinator from February 2013 until July 15, 2013, when the employer store management discharged her for uttering profanity in the workplace. The incident that triggered the discharge occurred on July 11, 2013, when Ms. Aschbrenner was in the backroom preparing merchandise to be moved to the sales floor. Julie Selby, Assistant Manager of Merchandising, came into the backroom and directed Ms. Aschbrenner to immediately move the rack of merchandise onto the sales floor. Ms. Aschbrenner was frustrated by the directive that she move the rack of clothing onto the sales floor before it was properly straightened. Ms. Aschbrenner told Ms. Selby, "No, it looks like shit. I'll fix it first and then I'll move it to the sales floor." Ms. Aschbrenner's frustration arose in part because she felt Ms. Selby routinely directed her to move merchandise to the sales floor before it was ready. Ms. Aschbrenner believed the directives to be contrary to company policy. Ms. Aschbrenner immediately realized that her comment was inappropriate and apologized to Ms. Selby. A couple sales associates had entered the back room as Ms. Aschbrenner had been speaking to Ms. Selby and likely overheard the remark.

Ms. Aschbrenner apologized to them as well. The comment was not uttered within earshot of any customers. When Ms. Aschbrenner next appeared for work, the management team summoned her to a meeting and discharged her from the employment.

The employer had previously reprimanded Ms. Aschbrenner for allegedly referring to Ms. Selby as "a rich bitch." Ms. Aschbrenner denies uttering the statement attributed to her.

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). 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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer did not participate in the hearing and, thereby, failed to present any evidence to prove misconduct in connection with the employment. The evidence in the record is sufficient to establish that on July 11, 2013, Ms. Aschbrenner uttered the profane statement referenced above. The utterance was an isolated outburst and involved poor judgment on Ms. Aschbrenner's part. The profane aspect of the utterance was not a challenge to Ms. Selby's authority. It was instead a blunt, inappropriate characterization of the appearance of the rack of merchandise. The employer has presented no evidence to prove that Ms. Selby's directive was reasonable. This one incident is insufficient to establish misconduct in connection with the employment that would disqualify Ms. Aschbrenner for unemployment insurance benefits. There is insufficient evidence to establish any prior similar incidents.

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

DECISION:

The agency representative's August 5, 2013, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs