

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**AUDE NGUENG-DETTY**  
Claimant

**MATTHEW L TARNOW**  
Employer

**APPEAL NO. 21A-UI-04858-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/29/20**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 26, 2021, reference 01, decision that allowed benefits to the claimant provided the claimant met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 30, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on April 14, 2021. The claimant, Aude Ngueng-Detty, participated. Matthew Tarnow represented the employer. Exhibits 1 through 4 and A were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO) and the quarterly wage reports (WAGE-A). The administrative law judge took official notice of the fact-finding materials for the limited purposes of confirming the employer's participation in the fact-finding interview and judging credibility.

**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: The claimant, Aude Ngueng-Detty, was employed by Matthew Tarnow, doing business as MidAmerica Securities Management Company, as the full-time office administrator/manager from 2016 until November 30, 2020, when the employer discharged her from the employment. As office manager in the three-person office, the claimant was responsible for a wide variety of tasks that included answering the phones, processing mail, working on investment literature, maintaining inventory, record-keeping, data-entry, vacuuming and sundry other tasks. Throughout the employment, Mr. Tarnow was the claimant's supervisor. The claimant generally worked independently to complete her various tasks. The claimant's wage at the start of the employment was \$12.00 per hour. The wage increased to \$13.00 per hour a year into the employment and held steady at \$14.00 during the last couple years of the employment.

The incident that triggered the discharge occurred on Monday, November 30, 2020, but carried over from the previous week. The incident that triggered the discharge concerned the annual newsletter the employer mails to its approximately 300 clients. The claimant's duties included placing the newsletter and the individualized client letter in envelopes in preparation for mailing. Prior to 2020, claimant would receive the newsletter and a client letters at the same time and then would efficiently collate the materials. The claimant estimates the task would take no more than one and half hours to complete.

During the week of November 22, 2020, the week that included Thanksgiving, the employer suggested to the claimant that she might want to start on the collating process by placing the newsletter in the envelopes. The employer had not yet provided the claimant with the individualized cover letter that needed to be included in the mailing. The claimant stated that she was still waiting for the client letters and would perform the task the following week.

Over the noon hour on Monday, November 30, 2020, the employer approached the claimant's desk and told the claimant that she needed to begin working on the collation project. The claimant had still not received the client letters that were to be included in the mailing and balked at the directive, which the claimant considered a directive that she take an unnecessarily inefficient approach to the task. The claimant was perturbed and commented that she always seemed to get the tasks that no one else in the office wanted to do. Another employee in the office, a person who divided his time between financial advising and functioning as Mr. Tarnow's assistant was responsible for getting the client letters ready. The claimant stated she felt that person should do the collating. An argument ensued. The argument included raised voices, but no profanity or offensive utterances. The employer perceived the claimant as being insubordinate. The claimant perceived the employer as badgering her. The disagreement ended when the employer told the claimant she was done, meaning she was discharged from the employment.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Admin. Code r.871 -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).

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).

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The evidence in the record establishes a discharge for no disqualifying reason. While the employer had the right to direct the work, that did not mean that the claimant, the person assigned to perform the task, was necessarily being unreasonable or insubordinate by expressing an opinion about how to perform the work efficiently or about the fairness of the apportionment of work in the workplace. The weight of the evidence fails to establish that the claimant actually refused to perform the work. The weight of the evidence establishes that the employer escalated the interaction. The employer presented insufficient evidence to prove a pattern of unreasonable refusal to follow reasonable directives. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

**DECISION:**

The January 26, 2021, reference 01, decision is affirmed. 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

August 3, 2021  
Decision Dated and Mailed

jet/mh