

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER M MILLER
Claimant

APPEAL NO. 09A-UI-17099-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 10/11/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 2, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 17, 2009. The claimant provided a telephone number for the hearing, but was not available at that number at the time of the hearing and did not participate. Kim Keil, District Leader, represented the employer. Exhibits One through Six and A 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.

Whether the claimant was discharged for a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Heather Miller was employed by Kwik Trip as a retail coworker (cashier) from 2003 until October 13, 2009, when Kim Keil, District leader, discharged her from the employment. Ms. Miller's immediate supervisor was Store Leader Joanne Good. Ms. Keil discharged Ms. Miller for making offensive remarks about Ms. Good. The final incidents that triggered the discharge concerned a conversation between Ms. Miller and a regular customer that occurred in the presence of Assistant Store Director Connie Galloway and a September 23, 2009 Face book post. The conversation occurred while Ms. Miller was on duty, but Ms. Miller made the Face book post while she was off duty. In both instances, Ms. Miller referred to Store Leader Joanne Good as a bitch. Both matters came to the attention of Ms. Galloway on or before October 2, 2009, the day Ms. Galloway printed off the Face book post. Ms. Galloway brought the matters to the attention of Kim Keil, District Leader, about a week before Ms. Miller was discharged. The employer had reprimanded Ms. Miller in February 2009 for similar conduct.

On October 13, 2009, Ms. Keil met with Ms. Miller to discuss the conduct Ms. Galloway had reported to Ms. Keil. Ms. Keil discharged Ms. Miller from the employment at that time.

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 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 weight of the evidence establishes that Ms. Miller's offensive remarks—uttered at Ms. Good's expense--amounted to misconduct in connection with the employment. But the weight of the evidence in the record establishes that the final acts that triggered the discharge came to the attention of a member of management, Assistant Store Director Connie Galloway, at least 11 days before the employer discussed the matters with Ms. Miller and discharged her from the employment. The weight of the evidence indicates that Ms. Galloway reported the matters to Ms. Keil at least a week prior to the discharge, if not earlier. Because of the delay between the time of the employer's first knowledge of the final acts and the employer's discussion with Ms. Miller, the conduct in question no longer involved current acts. In the absence of a current act of conduct, the discharge cannot serve as a basis for disqualifying Ms. Miller for unemployment insurance benefits. See 871 IAC 24.32(8).

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

DECISION:

The Agency representative's November 2, 2009, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs