

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMILY M RODRIGUEZ
Claimant

APPEAL NO. 11A-UI-14996-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 10/16/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 3, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 15, 2011. Claimant Emily Rodriguez participated. Roxanne Rose of ADP represented the employer and presented testimony through Angie Deridder, Ashley Smith, and Zak Klith. Exhibits One through Five 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: The employer operates the Buffalo Wild Wings Restaurant at Merle Hay Mall. Emily Rodriguez was employed as a part-time server from June 2010 until October 16, 2011, when Angie Deridder, general manager, discharged her from the employment.

The incident that triggered the discharge occurred on October 16, 2011. On that day, Ms. Rodriguez arrived late for work. The employer's timekeeping system does not allow tardy employees to clock in. Instead, the employee must notify a manager and enlist the manager's assistance to clock in. After Ms. Rodriguez arrived late on October 16, she was dissatisfied with the section she had been assigned. She waited until she had her first table to find a manager to clock her in. She located Ms. Deridder in the kitchen, where Mr. Deridder was engaged in doing a daily check of the cooks' line to make sure that temperatures and all else was in order.

Ms. Rodriguez was unhappy when Ms. Deridder suggested that she locate another manager and when Ms. Deridder said that Ms. Rodriguez would have to wait until Ms. Deridder was done with the line check. The exchange escalated from there. Ms. Rodriguez raised her voice and said that she was tired of working for free. Ms. Rodriguez asserted that she was tired of not being clocked in when she arrived. Though it was Ms. Rodriguez's repeated tardiness that created the need for a manager's assistance to clock in, Ms. Rodriguez believed that a manager

should observe her late arrival and immediately clock her in without being asked. This was not the established protocol.

Ms. Rodriguez continued to speak to Ms. Deridder in a hostile manner as Ms. Deridder attempted to complete the line check. Ms. Deridder directed Ms. Rodriguez to calm down and to walk away. Ms. Rodriguez did neither. Ms. Rodriguez's voice was loud enough to attract the attention of other employees and guests in the dining room. When Ms. Rodriguez continued in the same manner, Ms. Deridder told her she was fired and to leave the restaurant. At that point, Ms. Rodriguez told Ms. Deridder that she was "the worst fucking manager" and walked out of the kitchen. As Ms. Rodriguez was leaving the restaurant, she announced, loud enough for others to hear, that she had left "her shit" by the cash register.

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).

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).

The weight of the evidence establishes that Ms. Rodriguez intentionally disrupted the employer's business on October 16 because she felt the employer was not responding quickly enough to a situation Ms. Rodriguez had created through her tardiness and through waiting until she had her first table to tell the employer she needed assistance clocking in. The weight of the evidence indicates that Ms. Rodriguez challenged Ms. Deridder's authority as manager by refusing to calm down or to walk away when directed to do so. Ms. Rodriguez's belligerence and disrespectful conduct was loud enough to attract the attention of other employees and restaurant patrons. The conduct was in willful and wanton disregard of the interests of the employer and constituted misconduct. The weight of the evidence indicates that Ms. Rodriguez did tell Ms. Deridder that she was "the worst fucking manager." Regardless of whether this came before Ms. Deridder told her she was fired or in immediate response to it, the language was an attack on Ms. Deridder's authority and indicates Ms. Rodriguez demeanor and frame of mind.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Rodriguez was discharged for misconduct. Accordingly, Ms. Rodriguez 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. Rodriguez.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's November 3, 2011, reference 01, 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. This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw