

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHERRY L SMITH
1406 MCPHERSON #9
COUNCIL BLUFFS IA 51503

MOSAIC
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-0007

AMENDED

Appeal Number: 05A-UI-04339-JTT
OC: 03/27/05 R: 01
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Mosaic filed a timely appeal from the April 14, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 16, 2005. Sherry Smith participated in the hearing and presented additional testimony through Acelance Brittain. Attorney Lynn Corbeil represented Mosaic and presented testimony through Angela Wall, Program Coordinator; James Poehlman, Executive Director; and Rita Gochanour, Supervisor. Exhibits One through Four were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sherry Smith was employed by Mosaic as a full-time direct care worker from December 23, 2002 until March 30, 2005, when Angela Wall, Program Coordinator, discharged her for misconduct.

The final incident that prompted the discharge occurred on March 30, 2005. On that date, Ms. Wall contacted Ms. Smith to arrange a meeting later that day to discuss ongoing concerns regarding Ms. Smith's treatment of her co-workers and her immediate supervisor, Rita Gochanour. On March 29, Ms. Smith had telephoned Ms. Gochanour to complain about not receiving a requested day off. Ms. Smith became belligerent during the telephone call and yelled at Ms. Gochanour that it was her responsibility to either cover Ms. Smith's shift or find someone else to cover the shift. In addition, Ms. Gochanour had received several reports of Ms. Smith raising her voice toward co-workers, as well as threatening and intimidating co-workers.

Though Ms. Wall and Ms. Smith had agreed to meet at 4:00 p.m. on March 30, Ms. Smith arrived at about 10:00 a.m. Ms. Wall decided to go forward with the meeting at that time. James Poehlman, Mosaic's Executive Director, participated in the meeting with Ms. Wall and Ms. Smith via a telephone on speakerphone. Ms. Wall and Mr. Poehlman intended to present Ms. Smith with a final written warning for insubordination and unprofessional conduct. They did not intend, at the start of the meeting, to discharge Ms. Smith.

Ms. Smith had brought a friend with her to the workplace and had the friend wait outside the office during the meeting. Ms. Smith insisted on leaving the office door open so that her friend could "cover" her "if things got out of control." During the course of the meeting, Ms. Smith became belligerent. Ms. Smith asserted that other employees, including Ms. Gochanour, were all lying about her behavior. Ms. Smith complained about not receiving days off that she had requested. Mr. Poehlman attempted on three separate occasions to de-escalate the discussion. At one point, Ms. Smith stormed out of the meeting and told her friend that she was being fired. Ms. Wall advised Ms. Smith that she was only going to receive a warning. When Ms. Wall presented the written reprimand to Ms. Smith for her signature, Ms. Smith threw a lollipop she had in her mouth and said, "I ain't signing shit, I ain't saying shit."

Ms. Wall then advised Mr. Poehlman that since Ms. Smith was not open to feedback, she thought it best to terminate Ms. Smith's employment. Mr. Poehlman indicated that he agreed. When Ms. Wall then moved to disconnect the telephone connection with Mr. Poehlman, Ms. Smith raised her hand toward Ms. Wall's face and said, "Don't you dare touch that phone." Ms. Smith subsequently left the workplace. Mr. Poehlman followed up with a termination letter.

Ms. Smith had received previous warnings for unprofessional conduct. On December 2 and December 16, 2004, Ms. Gochanour counseled Ms. Smith regarding inappropriately raising her voice to her co-workers and Ms. Gochanour. During Ms. Smith's evaluation on December 23, Ms. Gochanour counseled Ms. Smith regarding instigating conflict with her co-workers and being disrespectful when receiving feedback. The written warning Ms. Wall intended to provide to Ms. Smith on March 30 indicated that the employer "strongly recommended that Sherry seek help from Employee Assistance for anger issues."

The employer has a written policy regarding professional conduct that is set forth in an employee handbook. On June 19, 2003, Ms. Smith acknowledged receipt of the handbook.

Under the policy, "Professionalism and respect are expected in all communications with clients, co-workers, supervisors, families and community representatives."

Ms. Smith established a claim for benefits that was effective March 27, 2005, and has received \$1,560.00 in benefits to date.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Smith was discharged for misconduct in connection with her employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since Ms. Smith was discharged, 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).

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).

Having had the opportunity to hear and weigh the testimony of all of the witnesses, the administrative law judge concludes that the testimony of Ms. Smith and her friend, Ms. Brittain, is not credible. Ms. Smith's testimony was a blanket denial of wrongdoing. Such testimony does not comport with the weight of the evidence. Ms. Brittain's testimony was of little substance and was clearly skewed toward supporting her friend's quest for continued benefits. On the other hand, the administrative law judge found the testimony of the employer's witnesses credible. The testimony of each of the employer's witnesses was internally consistent, was consistent with the testimony of the employer's other witnesses, and comported with the weight of the evidence.

The evidence in the record establishes that Ms. Smith had the habit of becoming belligerent towards her co-workers and her supervisors at Mosaic. Despite repeated warnings about such behavior, Ms. Smith continued to demonstrate a lack of self-control and routinely escalated situations involving any measure of interpersonal conflict or constructive criticism into belligerent tirades. Ms. Smith engaged in such a tirade on March 30, when Ms. Wall and Mr. Poehlman were attempting to issue her a written reprimand. The tirade on March 30 involved use of vulgar language and a threat of violence directed toward Ms. Wall. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Smith was discharged for misconduct. Accordingly, a disqualification for benefits will enter.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The \$1,560.00 in benefits Ms. Smith has received constitutes an overpayment that Ms. Smith will have to repay.

DECISION:

The Agency representative's decision dated April 14, 2005, reference 01, is reversed. The claimant was discharged for misconduct in connection with her employment. The claimant 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 claimant is overpaid benefits of \$1,560.00. The claimant will have to repay that amount.

jt/sc