IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAWN M GILBERT
Claimant

GREAT RIVER MEDICAL CENTER
Employer

APPEAL NO. 09A-UI-10266-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/14/09
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Dawn Gilbert filed a timely appeal from the July 15, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 4, 2009. Ms. Gilbert participated. Kelly Augustine, Human Resources Generalist, represented the employer and presented additional testimony through Jake Schnedler, Assistant Manager. Exhibits One through 13 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: Dawn Gilbert was employed by Great River Medical Center as a part-time laundry worker/stores department associate from June 2006 until June 15, 2009, when Jake Schnedler, Assistant Manager, discharged her from the employment.

The final incident that triggered the discharge occurred on June 15 at the end of Ms. Gilbert's performance review. During the review, Ms. Gilbert had expressed concerns about her work relationships to Mr. Schnedler and Mr. Schnedler had encouraged Ms. Gilbert to such concerns to Mr. Schnedler. During the meeting, Ms. Gilbert expressed her belief that her concerns would "go in one ear and out the other." At the end of the performance review, Ms. Gilbert left Mr. Schnedler's office and crossed the hall to the break room, where other employees were present. As Ms. Gilbert was entering the break room, she uttered the remark, "In one fricken ear and out the other." Ms. Gilbert's volume indicated that she wanted others to hear the remark directed as a comment on Mr. Schnedler.

On March 4, 2008, Laundry Supervisor Jan Heyveld issued a reprimand to Ms. Gilbert after Ms. Gilbert commented, that there were "no fucking carts" for her to use to perform her work. On March 12, 2008, Ms. Gilbert received a reprimand after she referred to a coworker as either a witch or a bitch in response to a question asked by another coworker. On February 23, 2009,

the employer disciplined Ms. Gilbert for directing offensive, profane remarks at a coworker. The employer deemed Ms. Gilbert's conduct in violation of the employer's established work rules that required her to perform her duties in a friendly, supportive manner. Ms. Gilbert's conduct and demeanor had prompted the employer to direct her to repeat the portion of her training that addressed civility in the workplace. In connection with the February 2009 reprimand, the employer warned Ms. Gilbert that if the conduct continued she would be discharged from the employment.

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).

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 indicates that Ms. Gilbert's remark on the last day of her employment was intentionally uttered so that others would hear the disrespectful remark directed at Mr. Schnedler. This conduct on the last day was part of a self-sabotaging pattern of uttering offensive, profane remarks directed at others. While the final remark by itself would not necessarily establish misconduct serious enough to disqualify Ms. Gilbert for unemployment insurance benefits, the pattern of offensive remarks, in the context of repeated reprimands for similar conduct, establishes an ongoing willful and wanton disregard of the employer's interests in maintaining a civil workplace.

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

DECISION:

The Agency representative's July 15, 2009, reference 01, decision is affirmed. 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 will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs