IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARLENA L CRONE
Claimant

SAC & FOX TRIBE
MESKWAKI BINGO CASINO & HOTEL
Employer

APPEAL NO. 13A-UI-02741-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/03/13
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 March 1, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 3, 2013. Claimant Marlena Crone participated. Lucy Roberts, Human Resources Director, represented the employer and presented testimony through Eric Brillon, Laundry Manager. Exhibits One, Two, Three and Five through Eleven 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: Marlena Crone was employed by the Sac & Fox Tribe, doing business as Meskwaki Bingo Casino & Hotel, on a full-time basis from 2007 until February 1, 2013, when Eric Brillon, Laundry Manager, discharged her from the employment. Ms. Crone had started in the Laundry Department in March 2012 and Mr. Brillon had been her supervisor since that time. Kevin Larson was one of Ms. Crone's coworkers in the Laundry Department. Ms. Crone and Mr. Larson sometimes got along and sometimes did not.

The final incident that triggered the discharge concerned an allegation that Mr. Larson made to Mr. Brillon on January 27, 2013. Mr. Larson started by leaving a written statement for Mr. Brillon. Mr. Larson wrote as follows:

> I [don't] appreciate Marlena telling me how to do my job, when she stands around talking. I feel this is a repetitive display of anger directed towards me. If seems to be a negative pattern of behavior.

When Mr. Brillon saw the note from Mr. Larson, he summoned Ms. Crone and Mr. Larson to a meeting. He asked both what was going on and why they were unable to get along. Ms. Crone

asserted there was no problem and that she thought they were getting along. Mr. Larson alleged that Ms. Crone had swore at him and that instead of doing what she was supposed to do, she was worrying about what he was doing. Ms. Crone denied that she had directed inappropriate language at Mr. Larson. Mr. Brillon told both that the situation was ridiculous, that they were all adults, and encouraged them to get along. Mr. Brillon told the pair that each would receive a reprimand. Mr. Brillon attempted to speak to another employee, Betty Plowman, who had been present in the laundry area that day, but Ms. Plowman declined to get involved.

In making the decision to discharge Ms. Crone from the employment, the employer considered prior similar matters involving Mr. Larson and Ms. Crone. The employer had counseled both for gossiping and for contributing to the discord in the workplace.

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 employer had presented insufficient evidence, and insufficiently direct and satisfactory evidence to establish misconduct in connection with Mr. Larson's final complaint to the employer on January 27, 2013. The employer presented no testimony from Mr. Larson or Ms. Plowman, the other employee apparently present for whatever happened between Mr. Larson and Ms. Crone. Interestingly, the employer had previously reprimanded Mr. Larson on multiple occasions for gossiping and causing discord in the employment. One of Mr. Larson's prior complaints about Ms. Crone was conveniently uttered at a time when the employer was reprimanding Larson for gossiping and speaking ill of members of management. The weight of the evidence in the record indicates that Mr. Larson was an unreliable complainant. In addition, Mr. Brillon did not document and could not remember what Mr. Larson alleged Ms. Crone had said to him on January 27. With regard to the final incident, the evidence establishes nothing more than that Mr. Larson made an allegation. The employer has presented insufficient evidence to prove the allegation true. The fact that Mr. Larson and Ms. Crone did not get along is not sufficient to establish misconduct in connection with the final incident.

In the absence of proof of misconduct on the part of Ms. Crone in connection with the final incident that triggered the discharge, the administrative law judge concludes that the evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, the administrative law judge must conclude that Ms. Crone was discharged for no disqualifying reason. Because there was insufficient proof of a current act of misconduct, the administrative law judge need not further consider the allegations of prior misconduct. Ms. Crone is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's March 1, 2013, 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

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Decision Dated and Mailed

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