IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

MURENDA K MEINDERS Claimant **OPTIMAE LIFESERVICES INC** Employer	**APPEAL NO. 22A-UI-16112-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/10/22** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On August 15, 2022, Murenda Meinders (claimant) filed a timely appeal from the August 11, 2022 (reference 01) decision that disqualified the claimant for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion the claimant was discharged on July 6, 2022 for using profanity on the job. After due notice was issued, a hearing was held on September 13, 2022. Claimant participated personally and was represented by attorney Emma Shimanovski. Johnna Libben represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Murenda Meinders was employed by Optimae LifeServices, Inc. as a Direct Support Professioinal (DSP) from September 2020 until July 6, 2022, when the employer discharged her from the employment. The claimant last performed work for the employer on the morning of July 4, 2022. The employment began as part-time. In April 2022, the claimant transitioned to full-time employment. The claimant's duties as a DSP involved assisting disabled clients with activities of daily living, which included assisting clients with goal setting, skills building, cooking and cleaning, and budgeting. The claimant's duties also included transporting clients to and from medical appointments. Once the claimant became full-time, she was generally scheduled to work the overnight shift, midnight to 8:00 a.m. Tuesday, Thursday, Friday and every other weekend. The claimant was scheduled to work an additional shift on Wednesday. The claimant was generally scheduled for 81 hours per two-week period. The claimant performed her work duties in multiple client houses in Burlington. Linda Koenig, Service Coordinator, was the claimant's primary supervisor throughout the employment.

On July 6, 2022, the employer notified the claimant she was being discharged for raising her voice and using profanity during a July 5, 2022 telephone call with Assistant Regional Director Barb Whitten. Regional Director Angie Torres, Program Director Michael Dunn, and Ms. Koenig

made the decision to discharge the claimant from the employment. Ms. Libben, the employer's sole witness for the appeal hearing, was not involved in the decision to discharge the claimant, was not involved in any investigation of the matter, but was the person who notified the claimant of the discharge on July 6, 2022.

At 8:00 p.m. July 4, 2022, the claimant notified the on-call supervisor that she would be absent from her midnight to 8:00 a.m. shift because she felt exhausted. The claimant was not ill. The claimant's purported exhaustion was self-induced. The claimant desired to pick up shifts. The employer was somewhat short-staffed and allowed the claimant to pick up shifts. The employer does not require employees to pick up shifts or work double-shifts.

The claimant had agreed to pick up the house manager's 4:00 p.m. to midnight shift on July 2, 2022, despite being scheduled to work the midnight to 8:00 a.m. shift that followed. The employer's policy prohibited the claimant from sleeping during the overnight shift. The claimant ended up having to remain in the workplace until 10:00 a.m., at which time another DSP arrived and the claimant was able to leave. The claimant ended up working an 18-hour shift.

The claimant also agreed to pick up the house manager's 4:00 p.m. to midnight shift on July 3, 2022, despite being scheduled to work the midnight to 8:00 a.m. shift that followed. The claimant ended having to remain in the workplace until 9:00 a.m., at which time another DSP arrived and the claimant was able to leave. The claimant ended up working a 17-hour shift.

On the morning of July 4, 2022, the claimant went to sleep at 9:30 a.m. The claimant slept until about 8:00 p.m., at which time she notified the employer she would be absent from her midnight shift due to exhaustion. The claimant had slept about 10 hours on July 4 prior to notifying the employer she was too exhausted to report for her midnight shift. The claimant asserts that her face was "drooping" and that she "had the shakes" when she called in for the shifts. A reasonable person would expect a person who had just slept upwards of 10 hours to be fully rested and would not expect the person to suffer from such maladies as described by the claimant.

At 9:00 a.m. on July 5, 2022, Barb Whitten, Assistant Regional Director, called the claimant regarding her absence from the overnight shift. Ms. Whitten was following the employer's COVID-19 protocol. Ms. Whitten was under the impression the claimant had said something about a migraine headache when she called in her absence for the midnight shift. Ms. Whitten is still with the employer, but did not testify at the appeal hearing. Ms. Libben's knowledge of the call between the claimant and Ms. Whitten is based on Ms. Whitten's July 6, 2022 incident report regarding the July 5 call. Ms. Whitten's notes state Ms. Whitten initially called the claimant at 9:00 a.m. on July 5, that the claimant did not answer, and that Ms. Whitten left a message identifying who she was and that she was calling about the claimant's "symptoms." Ms. Whitten requested a return call. Ms. Whitten also sent a text message to the claimant. The claimant promptly returned the call. Ms. Whitten told the claimant the employer did not have any documentation in the claimant's personnel file indicating the claimant suffered from migraine headaches. Ms. Whitten's notes state that the claimant started yelling and cursing. Ms. Whitten's notes state the claimant used the word fuck a couple times and said "this is bullshit." Ms. Whitten's notes state she told the claimant the conversation needed to end until the claimant could calm down. Ms. Whitten's notes state the claimant then recommenced yelling and cursing, saying "this is fucked" and "bullshit." The call lasted less than a minute. The claimant and Ms. Whitten were the only people on the call and the only people able to hear the call. While the employer asserts the claimant exploded in at least a couple profane rants during the call, the claimant asserts that she merely stated she was "freaking exhausted" and

denies using profanity during the call. The claimant specifically denies using the work fuck or a variation of that word.

The employer provided the claimant an employee handbook at the start of the employment. The handbook included a policy that required the claimant to be respectful toward others and that required the claimant to refrain from abusive or offensive language.

The claimant's supervisor performed a "check in" with the claimant on June 15, 2022 in response to an allegation the claimant raised her voice to the on-call supervisor. The employer witness is unaware of the particulars and further advises the "check in" with the claimant was not disciplinary in nature.

The employer references May 17, 2021 and November 8, 2021 disciplinary actions for medication issues, but is unaware of the particulars.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). The

Legislature recently codified the misconduct definition along with a list of types of disqualifying misconduct. See Iowa Code section 96.5(2)(d).

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 Iowa Admin. Code r.871 -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).

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 evidence in the record establishes a discharge for no disqualifying reason. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut the claimant's testimony regarding the July 5, 2022 phone call. The employer presented insufficient evidence to prove the claimant uttered profanity during the July 5, 2022 call. The employer had the ability to present testimony through Ms. Whitten, but elected not to present such testimony. The unsworn incident report prepared a day after the call is insufficient by itself to rebut the claimant's sworn testimony. The claimant's statement during the July 5 call about being "freaking exhausted" did not rise to the level of misconduct in connection with the employment. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 11, 2022 (reference 01) decision is REVERSED. The claimant was discharged on July 6, 2022 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

October 11, 2022
Decision Dated and Mailed

mh

APPEAL RIGHTS. If you disagree with the decision, you tor any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.