IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

TAMARA K COX Claimant **ASPEN AIRE INC** Employer	**APPEAL NO. 20A-UI-03829-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/22/20** **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 April 29, 2020, reference 01, decision that allowed benefits to the claimant provided she met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 23, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on May 27, 2020. Claimant Tamara Cox participated personally and was represented by attorney Molly Hamilton. Megan Andrews, Office Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6, C, D, and F through K into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant (DBRO and KPYX).

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: Tamara Cox was employed by Aspen Aire, Inc. as a full-time service coordinator/dispatcher from December 2018 until March 22, 2020, when Megan Andrews, Office Manager, and Craig Spring, Service Supervisor, discharged her from the employment for violating the employer's social media policy. The social media policy states as follows:

> *Social Media Policy*
> Any employee found to be putting down or causing any defamation towards Aspen Aire Inc. or its employees will face immediate suspension and/ or termination.

The social media policy was contained in the employee handbook the employer provided to Ms. Cox at the start of the employment. Ms. Cox was at all relevant times aware of the policy.

On or about March 20 or 21, 2020, an unidentified employee of Aspen Aire, Inc. anonymously left a paper copy of two Facebook comment posts on Ms. Andrews' desk. Ms. Cox had placed both posts on her Facebook page. Ms. Cox was Facebook "friends" with 10 of her Aspen Aire coworkers. Ms. Cox had posted the more recent comment to her Facebook page on March 10, 2020. In the March 10, 2020 post, Ms. Cox wrote, "Who would have ever thought a company would not have bereavement for your mother in law, WOW!!" Ms. Cox's mother-in-law had passed away on March 5, 2020. Ms. Cox was absent from work on March 9, 2020 to attend her mother-in-law's funeral. When Ms. Cox added the post to her Facebook page the next day, she erroneously believed that her time away from work would not be covered under Aspen Aire's bereavement policy. Soon thereafter, Ms. Cox gained a better understanding of the bereavement policy, which allowed her an unpaid day off for the funeral. On March 11, 2020, Ms. Cox deleted the March 10 Facebook post. The second Facebook post that someone anonymously left on Ms. Andrews' desk was a post that Ms. Cox had added to her Facebook page in June 2019, at a time when she was angry with Mr. Spring, her supervisor. Ms. Cox wrote: "I'm doing all I can with 3 techs!!! I'm about to be looking for a new job!!! Get a fucking clue!!!!!!!!!!" Ms. Cox made this angry post at work, immediately after an interaction with Mr. Spring in which she felt Mr. Spring had been very rude and heavy-handed. Ms. Cox did not name the employer in either post, but it was readily evident that each comment was about her employment.

The employer cites an October 1, 2019, written reprimand as another factor in the discharge decision. Though Mr. Spring issued the reprimand to Ms. Cox in October 2019, the incident upon which the reprimand was based occurred three to four months earlier, when Ms. Cox hung up on a customer after the customer yelled and swore at her.

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 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).

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 National Labor Relations Act [29 U.S.C. §§ 151-169] protects the rights of employees to act together to address conditions at work, with or without a union. *See* www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/the-nlrb-and-social-media. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter. *Id.* The employer's social media policy is similar to social media policies that the National Labor Relations Board has repeatedly found to be unlawful. Ms. Cox's March 10, 2020 Facebook post regarding a condition of the employment, the funeral leave policy, was protected speech under the NLRA and cannot serve as the basis for a finding of misconduct in connection with the employment. The June 2019 Facebook post was not protected speech under the NLRA. Though Ms. Cox did not name the employer or the supervisor, it was clear from the post that she was talking about her employer and her supervisor. The post was the equivalent of a vulgar, offensive outburst directed at the supervisor. While the post was inappropriate, immature, and demonstrated extremely poor judgment, the administrative law judge concludes it

did not constitute disqualifying misconduct in connection with the employment. This is in large part because the conduct in question dates from several months prior to the discharge. When the employer first became aware of the post, and how the long the employer was aware of the post, remains a mystery, despite Ms. Andrews' assertion that *she* only became aware of the post days before the discharge. The administrative law judge concludes there is insufficient evidence to prove a current act of misconduct in connection with the employment. Ms. Cox is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The April 29, 2020, reference 01, decision is affirmed. The claimant was discharged on March 23, 2020 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

June 30, 2020
Decision Dated and Mailed

jet/scn