

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA M WEBSTER

Claimant

APPEAL NO. 08A-UI-04110-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES

Employer

**OC: 03/23/08 R: 03
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the April 18, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 7, 2008. Claimant Tina Webster was not available for the hearing and did not participate. Diane Elkins of TALX UC eXpress represented the employer and presented testimony through Administrator Lanny Ward, Food Service Supervisor Brenda O'Shogay, and Cook Marlene Allnutt. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Four into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tina Webster was employed by Care Initiatives as a full-time Dietary Aide from August 11, 1989 until March 20, 2008, when Food Service Supervisor Brenda O'Shogay discharged her. Mr. O'Shogay was Ms. Webster's immediate supervisor. The final incident that prompted the discharge occurred on March 19, 2008. On that date, Ms. O'Shogay overheard Ms. Webster tell a new employee that Ms. Webster was not supposed to tell the new employee what to do. The new employee had asked Ms. Webster a question because the new employee's trainer had not yet arrived. When Ms. O'Shogay overheard Ms. Webster's statement she went over to Ms. Webster and clarified that she had not prohibited Ms. Webster from providing guidance to the new employee. Ms. O'Shogay clarified that she had instead instructed Ms. Webster to provide appropriate guidance to the new employee if she gave the new employee a work assignment. At this point, Ms. Webster became belligerent. Ms. Webster said, "I hate this fucking place" and "I hate these fucking people." Ms. O'Shogay attempted to calm Ms. Webster.

Ms. O'Shogay then told Ms. Webster that if she could not calm down, she needed to leave. Ms. O'Shogay then turned her back to walk away.

While Ms. O'Shogay's back was turned, Ms. Webster hit Ms. O'Shogay in the upper arm area. Ms. O'Shogay confronted Ms. Webster and said, "You hit me." Ms. Webster denied hitting Ms. O'Shogay. Ms. O'Shogay directed Ms. Webster to leave. Ms. Webster said, "I hit somebody." Ms. Webster then stormed toward Cook Marlene Allnutt. Ms. Webster called Ms. Allnutt a bitch. Ms. Webster then continued to yell and use profanity as she made her way into an area, where residents could hear her. Ms. Webster then left the nursing home facility. The employer discharged Ms. Webster the next day.

The employer had a written policy that prohibited violence in the workplace. The employer had a policy that prohibited "use of foul, abusive or offensive language in the workplace." Ms. Webster was a long-term employee and was familiar with these policies.

Ms. Webster established a claim for unemployment insurance benefits that was effective March 23, 2008 and has received benefits totaling \$4,771.00.

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 employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The evidence in the record establishes that Ms. Webster was discharged for misconduct in connection with the employment. The weight of the evidence indicates that Ms. Webster directed assaultive behavior toward Ms. O'Shogay. The evidence also indicates that Ms. Webster threatened violence towards Ms. Allnutt and then charged toward Ms. Allnutt in a way that suggested she intended to carry out the threat. The evidence indicates that Ms. Webster directed offensive, profane language at Ms. O'Shogay and Ms. Allnutt.

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

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.

Because Ms. Webster has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Webster must repay to Iowa Workforce Development. Ms. Webster is overpaid \$4,771.00.

DECISION:

The Agency representative's April 18, 2008, reference 01, decision is reversed. 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. The claimant is overpaid \$4,771.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs