

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MOLLY K WELTER
Claimant

APPEAL NO. 07A-UI-03049-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02/25/07 R: 04
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Molly Welter filed a timely appeal from the March 20, 2007, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on July 25, 2007. Ms. Welter participated. David Williams of TALX UC eXpress represented the employer and presented additional testimony through Store Manager Dan Simon, Human Resources Manager Leah Hefel, and Produce Manager Rick Stecklein. Exhibits A and B 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: Molly Welter was employed by the Asbury Hy-Vee as a part-time salad bar clerk from May 22, 2002 until February 26, 2007, when Store Manager Dan Simon discharged her for insubordination and profanity.

On February 23, the Asbury Hy-Vee was very busy as customers prepared for an impending snowstorm. During Ms. Welter's shift, she was summoned to the front of the store to bag groceries. Ms. Welter complied with the summons, performed the grocery bagging duties and then returned to her salad bar duties. At this point, Ms. Welter was behind on her salad bar duties. This was due in part to the time she spent working at the front of the store and due in part to another produce department employee going home early. Shortly after Ms. Welter returned to her produce duties, Store Manager Dan Simon again summoned Ms. Welter and other employees to the front of the store. Ms. Welter advised Mr. Simon that she could not report to the front because she was two hours behind in her produce department work. Mr. Simon told Ms. Welter, "I don't care, get your ass up here." When Ms. Welter continued to refuse to respond to the front of the store, Mr. Simon told Ms. Welter, "Get up here or go home." A short while later, Mr. Simon learned that Ms. Welter had indeed gone home. Ms. Welter called the store later that day and asked for the store director's phone number. Mr. Simon

eventually provided Ms. Welter with the right number and Ms. Welter contacted the store director to complain about the interaction with Mr. Simon. Ms. Welter arranged a meeting with the store director for February 26.

On February 26, Ms. Welter brought with her an "Incident Report" she had drafted regarding the events of February 23. When Ms. Welter arrived for her meeting, she learned that the store director would not be participating in the meeting and that the meeting would be with Mr. Simon instead. Human Resources Manager Leah Hefel and Produce Manager Rick Stecklein were also present for the meeting. Mr. Simon intended to use the meeting to reprimand Ms. Welter for insubordination on February 23. During the meeting, Mr. Simon discussed with Ms. Welter the employer's policy that customer service takes priority over all other work responsibilities. Ms. Welter denied that the policy applied to her and insisted that her work priority was the produce department, not bagging groceries. During the meeting, Ms. Welter raised her voice and used profanity. Ms. Welter indicated that "fucking management" did not know what it was doing and should have called more employees into the store in anticipation of the pre-storm business. Ms. Welter used additional profanity in the course of the meeting and continued to use profanity and a raised voice after one or more of the managers told she was being disrespectful and needed to calm down. When Ms. Welter continued with the same behavior, Mr. Simon advised Ms. Welter that she was being 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). 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 greater weight of the evidence indicates that Ms. Welter was discharged for her use of profanity, not for the alleged insubordination from February 23. The greater weight of the evidence indicates that on February 23, Mr. Simon did tell Ms. Welter, “I don't care, yet your ass up here.” Though Mr. Simon's remark was unprofessional, disrespectful and inappropriate, this remark did not excuse or justify Ms. Welter's profane tirade on February 26. Ms. Welter's profane and offensive remarks went well beyond Mr. Simon's limited use of mild profanity. Ms. Welter's remarks were uttered as a direct attack on the authority of the managers with whom she was meeting, as well as an attack on store management generally.

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

DECISION:

The Agency representative's March 20, 2007, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until

she has worked in and 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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