

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JENNIFER C MCILRATH**  
Claimant

**APPEAL NO. 15A-UI-11324-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TRINITY REGIONAL MEDICAL CENTER**  
Employer

**OC: 09/20/15**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 7, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on September 22, 2015, for no disqualifying reason. After due notice was issued, a hearing was started on October 26, 2015 and concluded on November 2, 2015. Claimant Jennifer McIlrath participated. Ted Vaughn represented the employer and presented additional testimony through Julie Hewitt, Shelly Clark and Allison Birkey. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits A through F 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 was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer McIlrath, R.N., was employed by Trinity Regional Medical Center as full-time registered nurse for several years until September 22, 2015, when Ted Vaughn, Human Resources Manager, discharged her from the employment. Julie Hewitt, Nursing Manager, was Ms. McIlrath's immediate supervisor.

The final incident that triggered the discharge occurred on September 19, 2015. On that day, Ms. McIlrath was working in a patient's room with other nursing staff when Ms. Hewitt came to

the patient's room to get one of the staff members. The patient was in the room and alert at the time. Ms. McIlrath was frustrated with Ms. Hewitt because she believed that Ms. Hewitt had caused the nursing staff to fall behind on their duties that day by lacking appropriate information regarding the patient in question. As soon as Ms. Hewitt left the room, Ms. McIlrath uttered the comment, "Get the fuck out of my room you fat fucking cunt." The two surgery nurses who had come to collect the patient for surgery, Shelly Clark, R.N., and Allison Birkey, R.N., were present for the utterance and reported the utterance to their supervisor. A surgery nurse supervisor notified Ted Vaughn, Human Resources Manager, of Ms. McIlrath's September 19, 2015 utterance. During the employer's investigation, Ms. McIlrath denied uttering the particular remark. Ms. McIlrath told the employer she may have stated that she wanted Ms. Hewitt to get her ass out of the room. Ms. McIlrath's conduct in connection with the incident violated the written work rules that had been provided to her as recently as April 2015.

Ms. McIlrath established a claim for benefits that was effective September 20, 2015. Ms. McIlrath has received benefits totaling \$1,615.00 for the five-week period of September 20, 2015 through October 24, 2015.

On October 6, 2015, a Workforce Development claims deputy held a fact-finding interview to address Ms. McIlrath's separation from the employer. Ted Vaughn and Julie Hewitt participated in the fact-finding interview on behalf of the employer.

#### **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.

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). 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 evidence in the record establishes that Ms. McIlrath did indeed utter the comment attributed to her by Ms. Clark and Ms. Birkey. Neither Ms. Clark nor Ms. Birkey had any reason to manufacture any aspect of their testimony or their complaint to the employer concerning Ms. McIlrath's highly inappropriate and offensive utterance. The utterance was an attack on the authority of Nurse Manager Julie Hewitt. To make matters worse, the utterance occurred in the presence of a patient. The utterance was an intentional and gross violation of the employer's reasonable standards of conduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. McIlrath was discharged for misconduct. Accordingly, Ms. McIlrath 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 unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits, but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$1,615.00 for the five-week period of September 20, 2015 through October 24, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to the claimant.

**DECISION:**

The October 7, 2015, reference 01, decision is reversed. 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 claimant was overpaid \$1,615.00 for the five-week period of September 20, 2015 through October 24, 2015. The claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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