IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

WALTESHIA K MOORE Claimant **DOLGENCORP LLC** Employer	**APPEAL NO. 20A-UI-01375-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/26/19** **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 February 5, 2020, reference 01, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and that employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 16, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on March 3, 2020. Claimant Walteshia Moore participated. Adam Blackburn 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 4 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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 unemployment insurance benefits.

Whether the claimant must repay overpaid 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: Walteshia Moore was employed by Dolgencorp, L.L.C., doing business as Dollar General, as a Lead Sales Associate at the employer's store on Idaho Street in Waterloo from September 2019 until January 16, 2020, when the employer's corporate human resources personnel discharged her from the employment upon the recommendation of Adam Blackburn, District Manager. Mr. Blackburn notified Ms. Moore of the discharge decision.

The sole incident that factored in the discharge occurred on December 17, 2019, at a time when Ms. Moore was off-duty and shopping at a Dollar General store located on University Avenue in Waterloo. As Ms. Moore was waiting in line to make a purchase, she observed as the sales clerk handled a small-dollar customer return. When Ms. Moore heard the customer state that the customer did not have the credit or debit card that the customer used to make the purchase, Ms. Moore inserted herself in that conversation. Ms. Moore stated that she was the "Key Holder" at the Idaho Street store and that the clerk could give the customer a cash refund. The University Avenue Lead Sales Associate/Keyholder took exception to Ms. Moore inserting herself into the transaction and advised that the University Avenue store preferred to use the same method of payment for refunds as was used in the initial transaction. A heated exchange followed in which Ms. Moore asserted she was going to call her superiors and the University Avenue Lead Sales Associate contacted her store manager. Rude comments were exchanged. While the employer asserts that Ms. Moore told the University Avenue Lead Sales Associate that she did "not know what the fuck [she was] talking about and that Ms. Moore called the Lead a "fucking idiot," Ms. Moore denies making those statements. However, Ms. Moore concedes that she stated during the heated exchange that she was "fucking mad." A vendor who happened to present in the University Avenue store at the time of the disruption made an audio-recording of the exchange. During the heated exchange, Ms. Moore paid no attention to whether there were other customers present during the exchange. After Ms. Moore left the store, she realized the entire matter had been petty and called the store to apologize for her behavior. Ms. Moore's supervisor and Adam Blackburn, District Manager, learned of the incident on the day it happened.

Earlier in the employment, the employer provided Ms. Moore with access to an employee handbook that contained a policy that prohibited "Inappropriate conduct on Company property or at Company sponsored events" as well as a policy that prohibited "Use of profane or abusive language in the workplace…"

On December 27, 2019, Mr. Blackburn spoke with Ms. Moore regarding the December 17, 2019 incident. Mr. Blackburn told Ms. Moore that the corporate human resources personnel would made a decision regarding Ms. Moore's continued employment. On that same day, Mr. Blackburn forwarded the employee statements he had collected to the corporate human resources personnel. On January 16, 2020, Mr. Blackburn received the directive to discharge Ms. Moore from the employment and notified her of the discharge decision.

Ms. Moore established an additional claim for benefits that was effective January 19, 2020 and received $1,606.85 in benefits for seven weeks between July 19, 2019 and March 7, 2020. The additional claim for benefits was part of the benefit year that began for Ms. Moore on May 26, 2019. Dolgencorp, L.L.C. is not a base period employer for purposes of the claim year that began on May 26, 2019 and has not been charged for benefits in connection with that claim year.

On February 4, 2020, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Moore's separation from the employment. Ms. Moore provided an oral statement in connection with the fact-finding interview call that did not include intentional misrepresentation of material facts. The employer received appropriate notice of the fact-finding interview, which notice was directed the employer's third-party representative of record, Talx/Equifax. Neither the employer nor its representative participated in the fact-finding interview call. The deputy attempted to reach the designated party, Marissun Johnson of Equifax, at the designated number. When Ms. Johnson did not answer, the deputy left a voicemail message. Equifax submitted for the fact-finding interview the same exhibits the employer exhibits that were received into the appeal hearing record as Exhibits 1 through 4. The protest that Equifax filed on February 1, 2020 included dates of employment and the following narrative statement:

The claimant was discharged from their position with the employer due to inappropriate conduct by an employee while on company property. The claimant was shopping at a neighboring store during their time off when she engaged in a verbal altercation with an associate and began cursing and screaming in the store. The claimant was aware of all policies and procedures.

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 evidence in the record establishes a discharge for misconduct in connection with the employment. Ms. Moore's disruptive conduct and profane utterances at the employer's University Avenue store demonstrated an intentional and substantial disregard of the employer's interests in maintaining a pleasant, civil shopping environment and work environment. The employer warned Ms. Moore on December 27, 10 calendar days after the incident, that the conduct could result in her being discharged from the employment. In that context, the December 17, 2019 incident constituted a "current act" for unemployment insurance purposes. Ms. Moore is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Moore must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Iowa Administrative Code rule 871-24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews.
> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in

the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

Ms. Moore received $1,606.85 in benefits for seven weeks between July 19, 2019 and March 7, 2020, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Moore received constitute an overpayment of benefits. The employer did not participate in the fact-finding interview within the meaning of the law. The documentation the employer provided for the fact-finding interview did not include detailed written statements or documents that provided detailed factual information of the events leading to separation. Ms. Moore did not intentionally misrepresent matter at the fact-finding interview. Because the employer did not participate in the fact-finding interview within the meaning of the law and because Ms. Moore did not make intentionally misleading statements at the fact-finding interview, Ms. Moore is not required to repay the overpaid benefits. The overpaid benefits may be assessed to the employer's account. The employer will not be charged for benefits for the period subsequent to March 7, 2020.

DECISION:

The February 5, 2020, reference 01, decision is reversed. The claimant was discharged on January 16, 2020 for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $1,606.85 in benefits for seven weeks between July 19, 2019 and March 7, 2020. The claimant is not required to repay the overpaid benefits. The overpaid benefits may be assessed to the employer's account. The employer will not be charged for benefits for the period subsequent to March 7, 2020.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/scn