IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROSA L ZARLING
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 13A-UI-00900-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/23/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Rosa Zarling filed a timely appeal from the January 18, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 21, 2013. Ms. Zarling participated. Chad Parker, Club Manager, represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rosa Zarling was employed by the Sam Club in Davenport on a part-time basis from 2008 until December 28, 2012, when Brandy Carlton, Fresh Assistant Manager, discharged her from the employment for using profanity in the workplace. During the last four months of the employment, Ms. Zarling worked in the Club's café and Ms. Carlton was Ms. Zarling's immediate supervisor. Ms. Zarling was a cashier from the start of the employment until she commenced working in the café.

The final incident that triggered the discharge occurred on December 24, 2012. Ms. Zarling had set aside some items at the front of the store that she intended to purchase before she left for the day. Ms. Zarling had told the cashiers about the items so that no one would restock the items. One cashier, Sally True, restocked the items anyway. Ms. Zarling noticed this as she was finishing up her duties and found the items were not where she left them. When Ms. True indicated she had returned the items to stock, Ms. Zarling said, "That's fucked up." The employer had a policy prohibited use of profanity in the workplace. Ms. Zarling was aware of the policy. Ms. True and other cashiers heard remark, which Ms. Zarling uttered at the front of the store near the checkout lanes. The store was closed at the time and no customers were present. Ms. True reported the utterance to Ms. Carlton. On December 28, Ms. Carlton met with Ms. Zarling. Ms. Zarling admitted to uttering the remark and wrote a statement indicating the same. Ms. Carlton advised Ms. Zarling that she was discharged and escorted her from the store.

Though the employer's decision to discharge Ms. Zarling was based primarily on the profane utterance, the employer considered prior, unrelated reprimands insofar as they moved Ms. Zarling along the employer's progressive discipline spectrum. The next most recent reprimand had been issued in December 2011 and was based on alleged disrespect of a supervisor. The next most recent reprimand was issued in April 2011 and was based on Ms. Zarling's failure to return keys at the end of her shift. The keys were to a locked area at the front of the store. Ms. Zarling had been temporarily reassigned to work the door and had forgotten to return the keys at the end of her shift. The employer also considered another coaching record from April 2010. The record was based on an error Ms. Zarling made when ringing up a customer's purchase. The coaching document was never presented to Ms. Zarling.

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 weight of the evidence indicates that Ms. Zarling's discharge was based on an isolated use of profanity in the workplace. While Ms. Zarling testified that she and others used profanity in a non-offensive manner on occasion in the workplace, the only profanity that factored in the discharge was the comment Ms. Zarling uttered to a peer on December 24 to express her displeasure with the peer's decision to return set-aside items to stock. The employer presented no evidence to rebut Ms. Zarling's assertion that Ms. True's act of returning the items to stock was intended to tweak Ms. Zarling. Indeed, the employer presented no testimony from persons with personal knowledge of the incident that triggered the discharge. Under the circumstances, Ms. True's decision to report the utterance to a supervisor appears either an overreaction or further indication of an intent to tweak Ms. Zarling. That does not excuse the utterance, but it does put it in context. Ms. Zarling disingenuously asserted during the hearing that she was unaware of any rule prohibiting profanity in the retail establishment. Despite that assertion, and despite the violation of the employer's work rule against profanity, the administrative law judge concludes, based on the particular circumstances in evidence, that Ms. Zarling's utterance did not rise to the level of *substantial* misconduct in connection with the employment and would not disqualify Ms. Zarling for unemployment insurance benefits.

The next most recent reprimand was a full year before the incident that triggered the discharge. The employer failed to present testimony from persons with personal knowledge of that matter and failed to present sufficient evidence to establish any misconduct in connection with the December 2011 reprimand for alleged disrespect. Ms. Zarling's failure to return the keys in April 2011 and her error in ringing up a sale in 2010 are not sufficient to establish misconduct in connection with the employment and had minimal bearing on the discharge decision.

DECISION:

The Agency representative's January 18, 2013, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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