IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

SHELBIE DOOLIN Claimant **KUM & GO LC** Employer	**APPEAL NO. 22A-UI-15159-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/19/22** **Claimant: Respondent (5)**

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

STATEMENT OF THE CASE:

On July 18, 2022, the employer filed a timely appeal from the July 8, 2022 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion the claimant was discharged on May 17, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on August 23, 2022. Shelbie Doolin (claimant) participated. Robert Fiscus represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. 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.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Shelbie Doolin (claimant) was employed by Kum & Go, L.C. as a full-time Assistant Manager at the Hamilton Boulevard store in Sioux City until May 3, 2022, when Janelle Bowen, District Supervisor, discharged her from the employment. The claimant had transferred to the Hamilton Boulevard store in January 2022 as an overnight clerk, but had begun assisting at store in December 2021. The claimant was promoted to Assistant Manager shortly before she was discharged from the employment. The claimant's supervisor, General Manager Robert Fiscus, was on a leave of absence from April 28, 2022 through May 4, 2022 and was not involved in the discharge decision. Ms. Bowen is no longer with the employer.

The final incident that triggered the discharge occurred on May 2, 2022. The claimant stayed beyond the end of a 12-hour shift to assist with a freight delivery. In connection with the freight delivery, the claimant spent an extended period organizing freight in the walk-in cooler. The store clerks erroneously believed the claimant had left for the day and that the claimant had left

her personal cell phone at the workplace. The claimant was upset when she exited the cooler and learned that either the Food Manager or a part-time clerk had answered the claimant's personal cell phone and had erroneously told the claimant's boyfriend the claimant left work two hours earlier. The claimant uttered a comment to the effect that the coworkers were too lazy to check to see whether the claimant was in the walk-in cooler. Though the employer asserts the claimant called one or more coworkers "fat and lazy," the claimant did not call anyone fat on that day.

On the next day, the claimant reported for work as usual. Ms. Bowen reported to the Hamilton Boulevard store and summoned the claimant to a meeting in the office. Ms. Bowen invited the claimant to speak her mind regarding the incident from the previous day. When the claimant did not offer much information, Ms. Bowen chastised the claimant for the utterance directed at the clerks and directed the claimant to leave the store. Later that day, the claimant sent a text message asking Ms. Bowen whether she was discharged from the employment. Ms. Bowen stated the matter was out of her hands and wished the claimant well in her future ventures. The circumstances of the interactions were sufficient to communicate a discharge from the employment.

After the claimant was discharged, the two clerks involved in the May 2 incident reported the incident to Mr. Fiscus on May 5 when he returned from his leave of absence. Mr. Fiscus thinks Ms. Bowen may have prepared a disciplinary document, but is unaware of the contents. The two clerks present for the May 2 incident are still with the employer.

In December 2021, the claimant got into a verbal disagreement with a coworker at the Hamilton Boulevard store over the coworker's family circumstances. The employer addressed the matter with the claimant, but cannot recall the particulars beyond the matter concerning a "baby daddy."

In March 2022, the Food Manager for the Hamilton Boulevard store reported to Mr. Fiscus that the claimant had said to the Food Manager, "I used to be fat like you." Mr. Fiscus attempted to address the matter with the claimant. The claimant denies she specifically called the coworker fat, but asserts she merely commented that she herself used to be fat. Under either wording, the utterance was directed at the Food Manager as a comment about the Food Manager's weight. The claimant asserted she had a right to speak freely.

The employer witness advises the employer has a policy that prohibits harassment. However, the employer witness did not have the policy available at the time of the hearing and was unable to speak to the particulars of the policy. The claimant concedes the employer had a policy that prohibited harassment and that addressed the need to treat coworkers with respect.

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 Iowa Admin. Code r.871 -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 no disqualifying reason. The employer presented insufficient evidence to prove a "current act" of misconduct. The employer presented insufficient evidence to rebut the claimant's testimony regarding the final incident that triggered the discharge. The employer elected not to present testimony from the two employees involved in the May 2 incident. While the claimant's comment that the coworkers were "too lazy" to check to see whether she was in the walk-in cooler was inappropriate and disrespectful, the utterance did not rise to the level of disqualifying misconduct. The claimant's March utterance directed at the Food Manager was also inappropriate, but again did not rise to the level of misconduct. The claimant erroneously believed in that instance that she was mentoring the Food Manager. The employer elected not to present testimony from the Food Manager regarding the incident. The employer also presented insufficient evidence to establish misconduct in connection with the December 2021 disagreement. The employer witness was not present for any of the three incidents in question. Nor is there evidence to indicate Ms. Bowen considered anything other than the May 2 incident when discharging the claimant. A reasonable person might suspect there is more to the story than what the claimant shared in her testimony. The employer had the burden to present that additional evidence, but failed to do so. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 8, 2022 (reference 01) decision is MODIFIED only to correct the discharge date to May 3, 2022. 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.

James E. Timberland
Administrative Law Judge

October 3, 2022
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.