

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KAYLYN D LEE
Claimant

QPS EMPLOYMENT GROUP INC
Employer

APPEAL NO. 21A-UI-03328-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/10/20
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 12, 2021, reference 02, 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 that the claimant was discharged on November 5, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on March 23, 2021. The claimant did not provide a telephone number for the hearing and did not participate. Mai Lor represented the employer and presented additional testimony through Minelia Gallardo. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 and 2 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.

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: The claimant was employed by QPS Employment Group, Inc., a temporary employment agency, until November 5, 2020, when the employer discharged her from the employment. On October 13, 2020, the claimant a full-time, long-term, temp-to-hire work assignment as an order picker at a client business. QPS has an ongoing relationship with the client business.

On November 4, 2020, the client business terminated the claimant's assignment. This followed a verbal dispute between the claimant and another worker. The client business walked the claimant out and notified QPS that that the client was not to return. The client business notified QPS of the claimant's use of profanity without specifying what was said or the context. The claimant's supervisor reported to QPS that the claimant had hit his hand, but provided no other details or context.

Immediately after the client ended the assignment, the claimant reported to the QPS office and spoke with Recruiter Minelia Gallardo. Ms. Gallardo asked the claimant whether she had used profanity. The claimant admitted she had used profanity. Ms. Gallardo did not inquire as to the specific utterance or utterances or the context, beyond that the coworker did not think the claimant was wrapping a pallet in a satisfactory manner. Ms. Gallardo asked the claimant whether the claimant had hit the supervisor's hand, but limited the claimant to a yes-or-no response. The claimant indicated she had hit the supervisor's hand. Ms. Gallardo did not solicit additional information or context concerning the claimant's action. Ms. Gallardo notified the claimant that she would refer the matter to QPS human resources. On November 5, 2020, Ms. Gallardo notified the claimant that QPS was ending the employment. There were no other incidents that factored into the discharge decision.

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).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995).

The employer presented insufficient evidence to prove misconduct in connection with the employment. The discharge was based on a single incident wherein the claimant used unspecified profanity and, at some point, hit the supervisor's hand. The employer, QPS, did not conduct a reasonable or meaningful investigation of the matter prior to discharging the claimant from the employment. What the claimant actually said is unknown. The manner and circumstances in which the claimant hit the supervisor's hand is unknown. The employer had the ability to conduct a reasonable and appropriate investigation at the time of the incident, but elected not to do that. The employer had the ability to present testimony from persons with personal knowledge of the event in question, but elected not to do that. Though it would not be a substitute for sworn testimony, the employer had the ability to present something as simple and easy as a written statement from persons with personal knowledge, a statement containing meaningful context or details, but the employer elected not to do that. The employer has failed to meet its burden of proving misconduct by a preponderance of the evidence. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The January 12, 2021, reference 02, decision is affirmed. The claimant was discharged on November 5, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in dark ink on a light-colored background.

James E. Timberland
Administrative Law Judge

March 24, 2021
Decision Dated and Mailed

jet/kmj