

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADRIANNE Y LOVE
Claimant

APPEAL NO. 07A-UI-07485-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DPM SE 14TH LLC
POPEYE'S CHICKEN & BISCUITS
Employer

OC: 07/01/07 R: 02
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Popeye's Chicken & Biscuits filed a timely appeal from the July 26, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 20, 2007. Claimant Adrienne Love participated. Greg Emery, Director of Operations, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Employer's Exhibits One and Three through Seven into evidence. The administrative law judge left the record open until August 24, 2007, so that the employer could submit a DVD or CD containing surveillance records. However, the employer did not provide the requested surveillance records. The administrative law judge determines that an appropriate decision may be entered in this matter without receipt of the surveillance records.

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: Adrienne Love was employed by Popeye's Chicken & Biscuits from December 13, 2005 until June 18, 2007, when Greg Emery, Director of Operations, discharged her for violating the employer's policy against workplace violence. At the time of the discharge, Ms. Love was a full-time assistant manager. On June 17, Ms. Love grabbed an employee's neck after the employee threw Ms. Love's soft-drink away while the employee was cleaning. The employer had a policy that prohibited managers from making physical contact with an employee. Ms. Love was aware of the policy. The employee in question was alarmed by the contact. Ms. Love immediately admitted to the store manager that she had touched the employee.

Ms. Love established a claim for benefits that was effective July 1, 2006 and has received benefits totaling \$920.00.

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 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 greater weight of the evidence in the record indicates that Ms. Love engaged in an intentional act of physical aggression towards an employee on June 17, 2007. The act was in violation of the employer's policy. The act was not in self-defense. The conduct constituted substantial misconduct that disqualifies Ms. Love from receiving unemployment insurance benefits. Accordingly, Ms. Love 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 employer's account shall not be charged for benefits paid to Ms. Love.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Love has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Love must repay to Iowa Workforce Development. Ms. Love is overpaid \$920.00.

DECISION:

The Agency representative's July 26, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. 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 allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$920.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs