

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SAMANTHA NEAL

Claimant

APPEAL NO. 13A-UI-12956-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 10/27/13

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Samantha Neal filed a timely appeal from the November 19, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 11, 2013. Ms. Neal did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jackie Peel represented the employer and presented additional testimony through Sharon Bates. Exhibits One through Six were received into evidence. The administrative law judge took official notice of the Agency's record (APLT and Clear2There Hearing Control screen) that document the claimant's failure to provide a telephone number for the hearing.

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: Samantha Neal was employed by Casey's Marketing Company as a full-time kitchen clerk from 2011 until October 29, 2013, when the employer discharged her for directing offensive language that included a threat of violence at Sharon Bates, Assistant Manager. Jackie Peel, Store Manager, was Ms. Neal's immediate supervisor. Ms. Bates also had supervisory authority over Ms. Neal's employment.

The chain of events that triggered the discharge began on October 21, 2013. On that day, Ms. Neal got upset and angry with Ms. Bates when Ms. Bates directed Ms. Neal to collect supplies that Ms. Bates needed to repay a sister store for supplies previously borrowed from the sister store. When Ms. Neal started yelling at Ms. Bates, Ms. Bates told Ms. Neal that Ms. Neal needed to cool down. Ms. Bates then walked to the back room to check on another matter. Ms. Neal left the store without authorization prior to the end of her shift. When Ms. Bates discovered Ms. Neal had left, she notified Ms. Peel of the incident. A short while later, Ms. Neal also made contact with Ms. Peel. Ms. Neal asked for permission to return to work and finish her shift and Ms. Peel allowed Ms. Neal to do that over Ms. Bates' objections.

Ms. Neal was next scheduled to work on October 23. On that day, Ms. Peel met with Ms. Neal and Ms. Bates in an attempt to resolve the conflict between the two. During that meeting, when Ms. Peel had stepped away, Ms. Neal told Ms. Bates, "It's a good thing I left on Monday or I would have kicked your crippled ass." Ms. Bates has a serious back problem and uses a cane when she walks. Ms. Bates had been with the store and had previously had difficulty with Ms. Neal not accepting her authority. Ms. Bates wanted an apology from Ms. Neal for the utterance. Ms. Neal told Ms. Peel that she would apologize to Ms. Bates. On a later date, when Ms. Peel asked Ms. Neal whether she had apologized to Ms. Bates, Ms. Neal said she was not yet ready to apologize and would do it when she was ready. When Ms. Bates subsequently attempted to engage Ms. Neal in conversation that might provide an opening for an apology, Ms. Neal told Ms. Bates she did not have time to speak with her and walked away.

After Ms. Bates could not get the matter resolved to her satisfaction within the store, she contacted the employer's human resources department about the matter. The human resources department and the supervisor above Ms. Peel determined that Ms. Neal should be discharged from the employment. On October 29, 2013, Ms. Peel notified Ms. Neal that she was discharged from the employment. The employer has a written policy that prohibits harassment directed at any group protected under the law, including persons with disabilities. Ms. Neal had signed her acknowledgment of the policy at the start of her employment.

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) alone. 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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

The weight of the evidence in the record establishes a discharge that was based on Ms. Neal's utterance on October 23, 2013. That utterance was a direct attack on the supervisory authority of Ms. Bates. The utterance contained both offensive language and profanity. The utterance was harassing and included specific reference to Ms. Bates' disability. The utterance included a threat of violence directed at Ms. Bates. Ms. Neal's utterance constituted misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. Ms. Neal 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.

DECISION:

The Agency representative's November 19, 2013, reference 01, decision is affirmed. 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 employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs