

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**ALEXANDER C DAVIS**

Claimant

**APPEAL NO. 21A-UI-10729-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BWW RESOURCES LLC**

Employer

**OC: 03/15/20**

**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 30, 2021, reference 03, 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 February 5, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on July 1, 2021. Claimant did not provide a telephone number for the appeal hearing and did not participate. Craig Wilson 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 SIDES protest and of the fact-finding materials, if and when they become available, 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.

**ISSUES:**

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 BWW Resources, L.L.C., doing business as Buffalo Wild Wings as a full-time cook at the employer's restaurant on Merle Hay Road in Des Moines. The employment began in October 2020 and ended sometime in February 2021. The employer is unable to provide the separation date. The March 30, 2021, reference 03, decision refers to a February 5, 2021 separation date, but the employer thinks the separation might have been a couple weeks later. Assistance General Manager Ray DeMayo was the claimant's immediate supervisor and is still with the employer. Morgan Willson was General Manager at the time of the claimant's discharge from the employment. Ms. Willson separated from the employer April 1, 2021. Ms. Willson reported to District Manager Craig Wilson. Mr. Wilson was not involved in the discharge decision, but Ms. Willson notified Mr. Wilson of the discharge after it occurred.

The final incident that triggered the discharge occurred on the claimant's last day of the employment. On that day, the employer discharged a couple of the claimant's coworkers for fighting on the job. The claimant was upset that the discharge of the two coworkers left him with an increased amount of work. The claimant used a raised voice and profanity to express his displeasure. Ms. Wilson directed the claimant to leave and not return. The interaction occurred at a time when the restaurant was busy and when several staff were present in the restaurant.

## **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 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).

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, and insufficiently direct and satisfactory evidence, to meet its burden of proving, by a preponderance of the evidence, a discharge based on disqualifying misconduct in connection with the employment. The employer's sole witness for the hearing was not present for the incident that triggered the discharge. The employer indicates that several other staff members beyond Ms. Willson would likely have been present for the incident in question, but the employer presented no testimony from any witness with firsthand knowledge of the matter. The evidence presented at the hearing lacked specificity and leaves one to speculate as to what exactly the claimant said, how exactly the claimant said it, and the additional context. It would not be unreasonable for an employee at a busy restaurant to express frustration when assigned to perform work that would ordinarily be performed by three employees. It would not be surprising to hear profanity uttered in the kitchen of a busy restaurant.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The March 30, 2021, reference 03, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive, flowing style.

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James E. Timberland  
Administrative Law Judge

July 15, 2021  
Decision Dated and Mailed

jet/scn