

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TAMMY D LAZEAR**  
Claimant

**APPEAL NO. 13A-UI-10609-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WESTAR FOODS INC**  
Employer

**OC: 08/11/13**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 10, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 10, 2013. Claimant Tammy Lazear participated. Jeff Oswald of Unemployment Insurance Services represented the employer and presented testimony through Mandi Graham and Oscar Ramos. Exhibits One and Two were received into evidence. The administrative law judge took official of the agency's administrative record (DBRO) of benefits paid to the claimant.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Lazear was employed by Westar Foods, Inc., d/b/a Hardee's from 2009 until August 8, 2013, when the employer discharged her from the employment. Ms. Lazear worked as a part-time crew member at the employer's Euclid Avenue store in Des Moines. Oscar Ramos was General Manager of that store. Mandi Graham was General Manager in training at that store. Both had supervisory authority over Ms. Lazear's employment.

The incidents that triggered the discharge occurred on August 2, 2013, the last day Ms. Lazear performed work for the employer. Ms. Lazear and Shift Manager Sara Davis were at the workplace when Ms. Graham arrived for work. As Ms. Graham arrived for work, Ms. Lazear told her that she hoped Ms. Graham had the night shift covered because if she did not, Ms. Lazear was going to walk out. Shortly after Ms. Graham arrived, she had to make a call to the Dell computer company regarding a problem with the computer screens. Ms. Graham heard Ms. Lazear ask Ms. Davis if she could go outside and have a cigarette. Ms. Lazear had finished taking care of the customers in the store at that time and Ms. Davis said it was fine for

Ms. Lazear to step outside. Ms. Graham walked outside of the building while she was on the telephone. When she did, Ms. Lazear said to Ms. Davis, "That cunt." The comment was directed at Ms. Graham. Ms. Lazear was upset that Ms. Graham had gone outside at a time when she knew Ms. Lazear wanted to go outside to smoke a cigarette. When Ms. Graham walked around the corner of the building, Ms. Lazear opened the drive through window and yelled at Ms. Graham, "I know you heard that I wanted to go outside for a cig." Ms. Lazear then slammed the drive through window. Ms. Graham cut short her call and reentered the restaurant. Ms. Graham and Ms. Lazear then got in to a yelling match and Ms. Graham told Ms. Lazear to leave. Ms. Lazear continued to yell, but eventually left.

Within a few hours, Ms. Lazear posted a comment on her Facebook page about Ms. Graham. Ms. Lazear indicated that she had just put Ms. Graham in her place and that "Everyone should go to Euclid Hardee's and put her on platter." Ms. Lazear knew that the store was working short-staffed and wanted her friends to converge on the store and overwhelm Ms. Graham.

When Ms. Lazear appeared for work on August 3, Mr. Reyes suspended her from the employment while the employer further considered the matter. On August 8, Mr. Reyes notified Ms. Lazear that she was discharged from the employment.

At the time of the hearing, Ms. Lazear had received \$1,096.00 in unemployment insurance benefits for the period of August 11, 2013 through the benefit week that ended October 5, 2013.

#### **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 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).

Ms. Lazear’s two-word, “That cunt,” utterance to Ms. Davis about Ms. Graham was sufficient all by itself to establish misconduct in connection with employment that disqualifies her for unemployment insurance benefits. Ms. Lazear had no idea what Ms. Graham was doing on the phone or by going outside. No matter what Ms. Lazear was thinking or feeling at the time, the abhorrent utterance, at Ms. Graham’s expense, was completely out of bounds. Ms. Lazear aggravated that misconduct by yelling at Ms. Graham through the drive through window. That was a second act of misconduct. Ms. Lazear then continued to challenge Ms. Graham when Ms. Graham directed her to leave. That was the third act of misconduct. Ms. Lazear then posted further derogatory comments about Ms. Graham on her Facebook page and specifically solicited her friends to go disrupt the employer’s business, all to get back at Ms. Graham. The posting, aimed at a supervisor and about the workplace, was *in connection with the employment* and constituted the fourth act of misconduct that day.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Lazear was discharged for misconduct. Accordingly, Ms. Lazear 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. Lazear for the period on or after October 6, 2013.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later disqualified for benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant is overpaid \$1,096.00 in unemployment insurance benefits for the period of August 11, 2013 through the benefit week that ended October 5, 2013. This matter is remanded to the Claims Division for determination of whether the employer participated in the fact-finding interview, whether the employer can be relieved of charges for benefits paid for the period of August 11, 2013 through October 5, 2013, and whether the claimant must repay the overpaid benefits.

**DECISION:**

The agency representative's September 10, 2013, 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 employer's account shall not be charged for benefits paid to the claimant for the period on or after October 6, 2013.

The claimant is overpaid \$1,096.00 in unemployment insurance benefits for the period of August 11, 2013 through the benefit week that ended October 5, 2013. This matter is **remanded** to the Claims Division for determination of whether the employer participated in the fact-finding interview, whether the employer can be relieved of charges for benefits paid for the period of August 11, 2013 through October 5, 2013, and whether the claimant must repay the overpaid benefits

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs