IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MELYNDA D ALBERT
Claimant

HY-VEE INC
Employer

APPEAL NO. 15A-UI-02057-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/18/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Melynda Albert filed a timely appeal from the February 2, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged for misconduct on January 16, 2015. After due notice was issued, a hearing was held on March 19, 2015. Ms. Albert participated. Molly Rooney of Corporate Cost Control represented the employer and presented testimony through Jim Simmons, Ryan Minder and Tracie Williams. Exhibits One, Two, Three, Five, Six and Seven were received into evidence.

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: Melynda Albert was employed by Hy-Vee in Muscatine as a part-time server/bartender in the employer's in-store café from May 2014 until January 16, 2015, when Jim Simmons, Store Director, discharged her from the employment. The café was not the usual Hy-Vee Deli. Instead, it features a hostess, table service, and a bar.

The final incident that triggered the discharge occurred during Ms. Albert's shift on January 14, 2015. Ms. Albert had started her shift at 4:00 or 5:00 p.m. Ms. Albert's duties included bartending and waiting on tables. At some point between 6:00 and 7:00 p.m., there were 10-12 guests dining in the restaurant, but Ms. Albert did not have any active tables. Ms. Albert asked Ryan Minders, Assistant Restaurant Manager, for a 30-minute unpaid break so that she could leave Hy-Vee property to smoke. Mr. Minders was Ms. Albert's immediate supervisor and the restaurant manager on duty. The employer does not allow employees to smoke on company property. The employer requires that employees who leave the employer's property on personal business clock out. So in order for Ms. Albert to smoke during her shift, she would need to clock out for an unpaid 30-minute break and leave the property. The employer's written break policy requires that employees be scheduled to work an eight-hour shift to be entitled to a

30-minute unpaid meal break. Ms. Albert knew the written break policy. Ms. Albert also knew that she had sometimes been able to obtain a 30-minute unpaid break without being scheduled to work an eight-hour shift. When Mr. Minder denied Ms. Albert's request to leave for 30 minutes, Ms. Albert challenged his decision and started arguing with him. Ms. Albert continued to escalate the volume of her voice so that the restaurant diners became aware of the disruption and disagreement. Mr. Minder attempted to de-escalate the interaction, while reiterating the break policy. Mr. Minder then enlisted the assistance of the store shift manager, who explained to Ms. Albert that she was not entitled to the 30-minute break under the break policy. Ms. Minder elected to argue with the shift manager. Unbeknownst to Ms. Albert, one of the diners observing her yell at Mr. Minder and the shift manager was the newly hired Restaurant Manager, Tracie Williams. Ms. Williams was still in training at the Davenport Hy-Vee was has stopped to eat at the Muscatine store. During Ms. Albert's outburst, she threatened to get Mr. Minder fired. Ms. Williams reported the incident to the Store Director by email.

In making the decision to discharge Ms. Albert from the employment, the employer also considered an incident on December 4, 2014, when Ms. Albert posted to Facebook while she was dining in the employer's café. Ms. Albert wrote, "I'm looking at my boss like wait to purge MF." The reference to purge was a reference to a move wherein the characters are given a free day to commit criminal activity including murder. In other words, the post, taken at face value, was a threat to do grievous harm to the supervisor and referred to the supervisor by a vulgar, offensive epithet. Ms. Albert was Facebook friends with some of her coworkers and one or more coworkers provide Mr. Simmons with a copy of the post. Mr. Simmons issued a reprimand and told Ms. Albert that if it happened again, she and Hy-Vee would be parting ways. Ms. Albert had admitted to Mr. Simmons that she had written the test while eating in the employer's café.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

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 evidence in the record establishes misconduct in connection with the employment. The final incident boils down to Ms. Albert having a meltdown when the employer would not bend its break policy to accommodate Ms. Albert's desire or need to feed her nicotine addiction. Neither manager who addressed Ms. Albert to address and reinforce the break policy acted unreasonably. Ms. Albert elected to make a scene by yelling at and threatening Mr. Minder with consequences for not accommodating her request for an unearned 30-minute break. The final incident followed another, a little more than a month earlier, wherein Ms. Albert referenced a supervisor by a vulgar term and threatened harm to the supervisor while Ms. Albert was sitting in the employer's café observing the supervisor. Each of the incidents involved misconduct in connection with the employment sufficient to disqualify Ms. Albert for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Albert was discharged for misconduct. Accordingly, Ms. Albert 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 February 2, 2015, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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