

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

PAMELA LEYTEM
Claimant

APPEAL NO. 21A-UI-04347-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 11/15/20
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 January 22, 2020, reference 01, decision that allowed benefits to the claimant, provided she was otherwise eligible, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 18, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on April 7, 2021. Claimant participated. Alyce Smolsky of Equifax represented the employer and presented testimony through Courtney Willenborg, Kristen Paris, and Casey Stephens. Exhibits 1, 3, 5 and 8, A and B were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant. The administrative law judge took official notice of the materials submitted for and generated in connection with the fact-finding interview for the 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.

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: The claimant was employed by Care Initiatives as the full-time Dietary Service manager at Dubuque Specialty Care from February 2019 until November 18, 2020, when the employer discharged her from the employment for unprofessional conduct. Effective October 5, 2020, Courtney Willenborg was the Administrator-in-Training at Dubuque Specialty Care and the claimant's immediate supervisor.

The final incident that triggered the discharge occurred toward the end of the business day on November 17, 2020. At that time, the claimant entered Ms. Willenborg's office with the intention of speaking to Ms. Willenborg regarding an employee scheduling concern. At the time the claimant entered, Ms. Willenborg told the claimant that she had to participate in a resident

census call, that is a management conference call in three minutes. The claimant was frustrated and upset that the Ms. Willenborg would not take time there and then to speak with her regarding her concerns. The claimant expressed her concerns in a loud tone. The claimant took the opportunity to complain about needing to make a call regarding a broken ice machine, a task the claimant felt belong to the maintenance supervisor. The claimant did not yell and did not use profanity, but took an approach unbefitting an professional in a professional environment. Ms. Willenborg exacerbated the situation by verbally counting down the minutes the claimant had left to speak with her before she needed to get on the conference call. When the claimant exited Ms. Willenborg's office, she closed the door harder than necessary. The employer notified the claimant the next day that she was discharged from the employment.

In making the decision to discharge the claimant from the employment, the employer considered a verbal altercation that occurred between the claimant and the maintenance supervisor at a September 4, 2020 supervisors' meeting. At the time of the incident, Kristen Paris, Regional Director of Clinical Services, was functioning as Interim Administrator. During the meeting, the claimant attempted to get a definitive answer from the maintenance supervisor regarding when a particular painting project would completed. The maintenance supervisor repeatedly provided flip, non-committal responses. The claimant and the maintenance supervisor arose from their seats and engaged in a heated exchanged in the presence of the other department supervisors. The claimant told the maintenance supervisor, "Fuck you." The maintenance supervisor responded that the claimant should be discharged and told the claimant, "Kiss my ass." The claimant left the meeting and the maintenance supervisor followed after her to continue the disagreement. The employer considered discharging both employees from the employment, but elected to issue a written reprimand and a three-day suspension instead. The employer warned the claimant that further incidents would result in termination of the employment.

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 legitimate employer concerns regarding unprofessional conduct on the part of the claimant, but does not establish a current act of misconduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits. The weight of the evidence establishes that the claimant did indeed behave in an unprofessional manner while expressing her frustration to Ms. Willenborg on October 17, 2020. The claimant had other more reasonable, readily available approaches and had no excuse for behaving in a petulant manner during the interaction. Ms. Willenborg did not help matters by counting down the minutes before her census conference call. Either party could have taken the opportunity to set a meeting time that would not conflict with the census call, but neither party conducted herself in such reasonable manner. The claimant was, in her misguided way, attempting to fulfill the duties of her position at the time and was not willfully or wantonly

disregarding the interests of the employer. The September 4, 2020 incident the employer considered in making the discharge decision did indeed rise to the level of misconduct in the employment, based on the vulgar language and the context of the utterance. However that incident was more than two months in the past at the time of the discharge and, therefore, not a current act at the time of the discharge. The employer presented insufficient evidence to prove other instances of unprofessional conduct. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The January 22, 2020, reference 01, decision is affirmed. The claimant was discharged on November 18, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



James E. Timberland
Administrative Law Judge

April 27, 2021
Decision Dated and Mailed

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