IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CARMEN M MILLER
Claimant

KIRKWOOD COMMUNITY COLLEGE – AREA 1
Employer

APPEAL NO. 12A-UI-07951-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/10/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Carmen Miller (claimant) appealed a representative's June 28, 2012 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Kirkwood Community College (employer) for using profane language on the job. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 24, 2012. The claimant was represented by Kay Johansen, Attorney at Law, and participated personally. The employer participated by Sheri Hlavacek, Human Resources Specialist, and Michael Roberts, Director of Human Resources. The claimant offered and Exhibit A was received into evidence. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 25, 2002, as a full-time collection specialist. The claimant signed for receipt of the employer's handbook. The claimant was diagnosed with depression and anxiety. She notified the employer of her condition in August 2011.
The employer issued the claimant a 90-Day Professional Development Plan on November 21, 2011, for poor communication skills. The employer notified the claimant that further infractions could result in termination from employment. On June 8, 2012, the employer issued the claimant a statement indicating the Plan had expired.

On June 11, 2012, the claimant told the Director of Human Resources that she believed she should have received more than a one percent raise. The Director of Human Resources told the claimant to speak to the Chief Financial Officer. The claimant started discussing her situation and then the Chief Financial Officer took a call as she sat in his office. The claimant became upset and felt unimportant. When the call ended she lost control and used the words

shit, damn and fuck. The Chief Financial Officer told the claimant that if she continued, she would be terminated. The claimant stopped immediately. The Chief Financial Officer took the claimant to the Director of Human Resources and said she was fired for insubordination. The Chief Financial Officer told the employer that he asked the claimant to stop repeatedly but the claimant continued to use profanity.

The Chief Financial Officer did not testify at the hearing because he had a meeting. The employer did not request a postponement of the hearing or provide the Chief Financial Officer's written statement.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and,

therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said repeated conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's June 28, 2012 decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs