

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TAMI ABELL
Claimant

IMAGINE THE POSSIBILITIES INC
Employer

APPEAL NO. 21A-UI-03479-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

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 13, 2021, reference 01, 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 November 19, 2020, but not for a current act of misconduct. After due notice was issued, a hearing was held on March 26, 2021. Claimant, Tami Abell, did not provide a telephone number for the hearing and did not participate. Wendy Davis represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibits 1, 2 and 3 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: Claimant, Tami Abell, was employed by Imagine the Possibilities, Inc. as a full-time Direct Support Professional at an intermediate care facility in Creston from September 11, 2020 until November 19, 2020, when the employer discharged her for allegedly violating the employer's workplace violence policy. Stephanie Brown was the claimant's supervisor. Ms. Brown is no longer with the employer. The claimant usually worked three 12-hour shifts and one five-hour shift per week.

The employer alleges that on November 4, 2020, the claimant told coworker Frankie Rice "I know where you live and I might show up. No one likes you here and I was warned about you." Prior to the incident, Ms. Rice had given notice that she would be leaving her employment on November 10, 2020. Ms. Rice reported the matter to Ms. Brown on November 5, 2020 and provided a written statement. Ms. Rice wrote that she was in the kitchen preparing breakfast plates when supervisor Nicole Money stepped away for a moment and the claimant approached and made the above-referenced utterance.

After the employer spoke with Ms. Rice, the employer spoke with the claimant. The employer alleges that during the interview the claimant stated "That girl does not know who she is messing with." The employer alleges that the claimant confirmed stating to Ms. Rice that she knew where Ms. Rice lived and might just show up. The employer did not solicit a written statement from the claimant.

The employer asserts the supervisor told the claimant on November 5, 2020 that the conduct in question could lead to discharge from the employment. The employer has a workplace violence policy that the employer reviewed with the claimant at the start of her employment. Ms. Money sat in on the November 5 interview with the claimant and documented that the claimant said she knew where Ms. Rice's babysitter lived because the babysitter lived next door to the claimant. Ms. Money perceived the utterance as a threat. The employer concluded its investigation on November 5, 2020, but did not discharge the claimant at that time.

On November 9, 2020, the claimant commenced an extended absence due to illness. The claimant returned to work on November 19 2020 and was discharged at that time.

The employer had issued two previous reprimands to the claimant. On October 19, 2020, the employer issued a written warning regarding an absence and failure to properly report the absence. There were no other attendance issues.

On November 6, 2020, the employer issued a reprimand for the claimant's use of a Hoyer lift on October 15, 2020 without a second person assisting. The claimant had been at work between October 15 and November 6, but the employer elected to wait until November 6 to issue the written discipline.

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 Iowa Admin. Code r.871 -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).

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 employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to meet its burden of proving a discharge for misconduct in connection with the employment by the preponderance of the evidence. The employer's sole witness lacked personal knowledge of the matter that triggered the discharge. The employer had the ability to present testimony from one or more witnesses with personal knowledge, but elected not to present such testimony. The employer's evidence does not rise above unsubstantiated allegation, hearsay within hearsay. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The January 13, 2021, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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.

James E. Timberland
Administrative Law Judge

July 6, 2021
Decision Dated and Mailed

jet/kmj