

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAYANNA S LONG
Claimant

APPEAL NO. 07A-UI-03952-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**WILLOWBROOK FOOD INC
MCDONALD'S RESTAURANT**
Employer

**OC: 03/25/07 R: 02
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Willowbrook Food, doing business as McDonald's Restaurant, filed a timely appeal from the April 10, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 2, 2007. Claimant Jayanna Long participated. Store Manager Linda Oetken represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received employer's Exhibits One, Five, Six and Eight into evidence.

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: Jayanna Long was employed by McDonalds as a part-time crew member until March 24, 2007, when the store manager and the store owner discharged her. The final incident that prompted the discharge occurred on March 24, 2007. Swing Shift Manager Michele Madole instructed Ms. Long to cover her mouth when she coughed so that others would not become ill. As the manager walked away, Ms. Long raised the middle fingers of her hands to the manager in an offensive gesture directed at the manager. The meaning of the gesture was readily apparent and was the equivalent of telling the manager, "Fuck you." Another employee, Rhianna Oetken, witnessed the conduct and immediately informed Ms. Madole. Ms. Madole summoned Ms. Long to the office and Ms. Long admitted to making the hand gesture. After the meeting with Ms. Madole, Ms. Long went to Rhianna Oetken and called her a "little fucking tattletale."

The employer's work rules prohibit "insubordination or failure to obey instructions or to perform work as assigned" and "use of profane, obscene, vile or abuse language at the counter, or in the vicinity of the customers." Ms. Long was aware of the work rules.

Ms. Long established a claim for unemployment insurance benefits that was effective March 25, 2007 and has received benefits totaling \$606.00.

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).

The greater weight of the evidence establishes that on March 24, 2007, Ms. Long directed an offensive gesture at a supervisor in a disrespectful manner and as an attack on the supervisor's authority. Ms. Long made the gesture in the presence of other employees. After the manager indicated that Ms. Long would receive a reprimand for the behavior, Ms. Oetken directed an equally offensive comment to the coworker who had reported the matter to the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Long was discharged for misconduct. Accordingly, Ms. Long 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. Long.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Long has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Long must repay to Iowa Workforce Development. Ms. Long is overpaid \$606.00.

DECISION:

The Agency representative's April 10, 2007, reference 01, decision is reversed. 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 will not be charged. The claimant is overpaid \$606.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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