

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DELIGHT D HENDERSON
Claimant

APPEAL NO. 19A-UI-00767-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

G M R I INC
Employer

OC: 12/23/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 17, 2019, reference 02, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on December 21, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on February 11, 2019. Claimant Delight Henderson participated. Jacqueline Jones of Equifax represented the employer and presented testimony through Julia Stovie and Josh Keldgord. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibits 1, 9 through 13, 17, 18, 19 and 24 were received 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 was overpaid unemployment insurance benefits.

Whether the claimant is required to repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Delight Henderson was employed by GMRI, Inc., doing business as Olive Garden, as a food and beverage server from June 2017 until December 21, 2018, when Josh Keldgord, General Manager, discharged her from the employment. The conduct that triggered the discharge occurred on December 17, 2018. During that shift, it came to the attention of Manager Julie Stovie that Ms. Henderson had accepted cash payment from a customer for a customer's meal and beverage, had immediately thereafter voided the customer's check from the employer's computer system, and had pocketed the proceeds. Ms. Henderson had indeed committed theft

from the employer. Ms. Henderson might have succeeded in stealing from the employer if the affected customer not had accessed a table-side electronic billing device, noted an issue with the bill, and alerted Ms. Stovie to the irregularity. Ms. Henderson had borrowed the override card assigned to a lead server to make the void without telling the lead server what she was doing. To void the entire customer ticket from the system required that Ms. Henderson make multiple void entries. There was nothing accidental about Ms. Henderson's conduct.

After Ms. Stovie noted the voided customer bill, she contacted Mr. Keldgord for guidance. Mr. Keldgord was away from the workplace at the time. Mr. Keldgord directed Ms. Stovie to close Ms. Henderson's section, to commence an investigation, and to suspend Ms. Henderson from the employment. Ms. Stovie followed those instructions, reassigned Ms. Henderson's tables to another server, and had Ms. Henderson accompany her to the office. Ms. Stovie then questioned Ms. Henderson about the matter. Ms. Stovie pulled up the transaction record on the office computer. Ms. Henderson attempted to confuse the issue by referencing a coupon that another customer at the same table had used. The coupon had nothing to do with the matter Ms. Stovie was investigating and Ms. Stovie was not distracted from the matter at issue. Ms. Henderson wrote out a brief statement, discarded that statement, and wrote out another statement. During the interaction, Ms. Henderson told Ms. Stovie, "You be trippin' on some shit," by which Ms. Henderson meant that Ms. Stovie must be under the influence of drugs that were affecting her thought process.

When the pair was done in the office, Ms. Stovie escorted Ms. Henderson to the front of the restaurant so that Ms. Henderson could complete the usual cash-out process before she left the workplace. Ms. Henderson did not stay to cash out. Instead, she threw money and receipts on the counter and stormed out.

A short while later, Ms. Stovie was in the office with another employee when Ms. Henderson returned and pounded on the door of the office to gain entry. Ms. Stovie noted that Ms. Henderson smelled of marijuana. Ms. Henderson grabbed her money and receipts from the cash-out process and then directed threats at Ms. Stovie. Ms. Henderson stated, "God don't like ugly and he is going to come at you and your family." When Ms. Stovie asked whether Ms. Henderson was threatening her, Ms. Henderson denied that she was uttering a threat, but then went on to repeat the same threat.

The employer has a written cash handling policy and a written policy prohibiting abusive or profane language. The employer had reviewed these policies with Ms. Henderson at the start of the employment. Ms. Henderson's conduct on December 17, 2018 violated both policies. Mr. Keldgord referenced the abusive language policy on December 21, 2018, when he notified Ms. Henderson that she was discharged from the employment, but did not reference the cash handling issue at that time.

Ms. Henderson established an original claim for benefits that was effective December 23, 2018. GMRI, Inc. is a base period employer in connection with the claim. Ms. Henderson received \$4,428.00 in unemployment insurance benefits for the nine weeks between December 23, 2018 and February 23, 2019.

On January 16, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Henderson's separation from the GMRI/Olive Garden employment. Kelsey Boyd, GMRI Compliance Coordinator, represented the employer at the fact-finding interview. In addition, the employer submitted detailed documentation for the fact-finding interview that substantiated the basis for the discharge.

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 Administrative Code rule 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 Iowa Administrative Code rule 871-24.32(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 question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See *Myers v Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990). 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge based on misconduct in connection with the employment. Ms. Henderson's testimony regarding how the cash-paying customer's entire check came to be "accidentally" voided is simply not credible. The weight of the evidence establishes that Ms. Henderson knowingly and intentionally voided each individual item on the cash-paying customer's bill to void out the entire bill and did so in furtherance of her theft from the employer. The theft involved an intentional and substantial disregard of the employer's interests by denying the employer revenue from its business operations and fundamentally violating the trust relationship. The weight of the evidence establishes that Ms. Henderson got upset when she was caught in the act of stealing from the employer and, in that context, elected to engage in a personal attack on Ms. Stovie and Ms. Stovie's supervisory authority. Ms. Henderson's testimony that her "trippin' on some shit" utterance was not a drug reference is simply not credible. The offensive utterance was intended as an attack on Ms. Stovie's authority. Ms. Stovie reasonably interpreted Ms. Henderson's subsequent repeated threat as a threat. Ms. Henderson's assertion that she was not uttering a threat to harm Ms. Stovie is not credible.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Ms. Henderson is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Henderson must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Henderson received \$4,428.00 in unemployment insurance benefits for the nine weeks between December 23, 2018 and February 23, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Henderson received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Henderson is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The January 17, 2019, reference 02, decision is reversed. The claimant was discharged on December 21, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$4,428.00 in benefits for the nine weeks between December 23, 2018 and February 23, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs