

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARIA T CLARK
Claimant

APPEAL NO. 20A-UI-01193-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THOMAS L CARDELLA & ASSOCIATES INC
Employer

OC: 12/29/19
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 30, 2020, reference 01, decision that allowed benefits to the claimant provided she 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 December 30, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on February 25, 2020. Claimant Maria Clark participated. Myka Gilchrist, Director of Human Resources, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited 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.

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 benefits.

Whether the claimant must 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: Maria Clark was employed by Thomas L. Cardella & Associates, Inc. as a full-time Operations Supervisor until December 30, 2019, when Mark Grego, Site Director, discharged her from the employment. Ms. Clark began her employment in July 2018 as a Call Center Associate. In May 2019, Ms. Clark was promoted to Operations Supervisor. In August 2019, Ms. Clark was demoted to Call Center Associate. In October 2019, Ms. Clark was promoted again to Operations Supervisor. Ms. Clark supervised 23 subordinates. Ms. Clark reported to Mr. Grego.

The conduct that triggered the discharge occurred on December 27, 2019 and followed the employer's announcement that it would be transitioning the Operations Supervisors from salaried positions to hourly positions. Ms. Clark was unhappy about the change in pay structure, though it would have little, if any, impact on her compensation. Before Ms. Clark reported for work on December 27, 2019, she visited a café where she consumed a non-alcoholic Bloody Mary. Ms. Clark took a photo of the drink and sent the photo to Call Center Associate Javon Stalworth's cell phone to give the impression that she was consuming an alcohol beverage prior to reporting for work. Mr. Stalworth was a step below Ms. Clark in the workplace hierarchy, but did not report to Ms. Clark. In her electronic correspondence with Mr. Stalworth, Ms. Clark referred to Allison Armstrong, Program Manager, as "a bitch-ass who does not work eight hours ever and still gets paid." Mr. Stalworth brought the electronic correspondence to the attention of Ms. Armstrong. Ms. Clark later corresponded with Mr. Stalworth to ask whether he had shared the correspondence with the employer. Mr. Stalworth shared this additional correspondence with the employer. Mr. Grego subsequently looked into the matter. Ms. Clark provided a receipt for the non-alcoholic Bloody Mary. Mr. Grego discharged Ms. Clark based on the abusive language Ms. Clark used when speaking of Ms. Armstrong in her correspondence with Mr. Stalworth. The employer has an employee handbook that the employer made available to Ms. Clark at the start of her employment. The handbook prohibited "Directing abusive or threatening language at any company supervisor, company employee, or company representative." The policy indicated that violation of the policy could result in immediate suspension and/or dismissal from the employment.

Ms. Clark established an original claim for benefits that was effective December 29, 2019. This employer is the sole base period employer for purposes of the claim. Ms. Clark received \$693.00 in benefits for three weeks between February 9, 2020 and February 29, 2020.

On January 29, 2020, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Clark's separation from the employment. Ms. Clark did not participate. The employer did not participate in the fact-finding telephone call, but submitted documentation for the deputy's consideration. The documentation included a termination form that set forth the pertinent details of the final incident that triggered the discharge as well as the relevant policy.

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 use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990)

The evidence in the record establishes a discharge for misconduct in connection with the employment. The employer presented insufficient evidence to rebut Ms. Clark's testimony that the Bloody Mary she consumed prior to reporting for work in December 27, 2019 was non-alcoholic. Ms. Clark's assertion that she was unfamiliar with the handbook or the policies that factored in the discharge is not credible. Ms. Clark was a supervisor for an extended period and supervised upwards of two dozen subordinates. Ms. Clark knowingly and intentionally violated the employer policy pertaining to abusive language when she employed abusive and profane name-calling language while corresponding with Mr. Stalworth about Ms. Armstrong. Through the electronic correspondence, Ms. Clark made Mr. Stalworth an involuntary participant in her misconduct. Ms. Clark's conduct demonstrated an intentional and substantial disregard for the employer's interest in maintaining a civil work environment. Ms. Clark 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. Clark 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 for 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. Clark received \$693.00 in benefits for three weeks between February 9, 2020 and February 29, 2020, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Clark received constitute an overpayment of benefits.

Iowa Administrative Code rule 871-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting

detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The employer participated in the fact-finding interview within the meaning of the law. The termination form and the policy materials provided sufficient information, if un rebutted, to result in a decision favorable to the employer. Because the employer participated in the fact-finding interview, Ms. Clark 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 30, 2020, reference 01, decision is reversed. The claimant was discharged on December 30, 2019 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 \$693.00 in benefits for three weeks between February 9, 2020 and February 29, 2020. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn