IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMARA K STEELE
Claimant

OPTIMAE LIFESERVICES INC
Employer

APPEAL NO. 11A-UI-05817-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/20/11
Claimant: Appellant (1)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Tamara Steele filed a timely appeal from the April 18, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 25, 2011. Ms. Steele participated and presented additional testimony through Kris Metcalf. Christina Martin, human resources specialist, represented the employer. Exhibits 1 through 12 and A 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: The employer operates a mental health clinic. Tamara Steele was employed as a full-time secretary from 2009 until March 24, 2011, when Kerri Durand, regional business financial director, discharged her from the employment. Ms. Durand supervised the front office staff, including Ms. Steele.

On March 23, 2011, Ms. Durand, Program Director Barb Whitten, and Kris Martin met with Ms. Steele to reprimand her in connection with incidents that had occurred during the two previous days. On March 21, a client in crisis had contacted the mental health clinic, wanting to be seen. Services to that client were covered by Medicare/Medicaid and the employer could not receive compensation for services to the client unless the doctor was present in the clinic. Ms. Durand directed Ms. Steele to refer the client to the Emergency Room. Ms. Steele thought the clinic should provide services, was not satisfied with Ms. Durand's response and challenged the directive both through her words and tone of voice. In Ms. Steele's words, she was "frustrated" with the supervisor and "vented" to the supervisor. On March 22, the billing specialist approached Ms. Steele to ask in a hostile manner why a patient's county of residence had not been updated on the computer file. Ms. Steele responded in kind. Ms. Steele's response included going to the billing specialist's office and directing the billing specialist to get

on her computer so that Ms. Steele could point out that the address had indeed been updated in January.

In connection with the March 23 meeting, the employer directed Ms. Steele to read the Employee Conduct and Disciplinary Report Form the employer had prepared for the meeting. The typed reprimand included the following:

> This suspension will be for 2 days (March 24 and 25) and unpaid. Upon return to work, if disrespect, negativity or any other serious disciplinary actions occur, your job will be terminated immediately. Discussion of this disciplinary action with anyone employed will result in immediate termination.

Ms. Steele read the documents, added her comments to it in the space provided, and signed the document.

On the morning of March 24, Ms. Durand covered Ms. Steele's front desk duties. When Ms. Durand opened the web browser on Ms. Steele's computer to check patients' Medicare eligibility, she observed that Ms. Steele's personal Facebook page was set as her Internet home page. On the Facebook page was displayed correspondence that morning between Ms. Steele and Kris Metcalf, a contract therapist in the clinic. Ms. Steele was corresponding from home. Mr. Metcalf was corresponding from the clinic. The focus of the conversation was the reprimand meeting on March 23 and the negative opinion the two had of clinic management staff. The correspondence included several derogatory and offensive comments about clinic management, especially Ms. Durand and Ms. Whitten. The employer moved forward with discharging Ms. Steele based on her disregard of the directive not to discuss the reprimand conference and based on the incidents leading up to that meeting.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

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 weight of the evidence in the record establishes that Ms. Steele was indeed discharged for misconduct in connection with the employment. The misconduct included repeated acts of insubordination. These included Ms. Steele's March 21 refusal to accept, and disrespectful

challenge to, Ms. Durand's reasonable directive that she refer the Medicare/Medicaid client to the Emergency Room. These included Ms. Steele's blatant disregard of the employer's reasonable directive that she not speak to others within the clinic regarding the meeting that occurred on March 23. The misconduct included the derogatory, offensive comments Ms. Steele directed at Ms. Durand and Ms. Whitten in the Facebook correspondence and Ms. Steele's affirmation of similar or worse remarks Mr. Metcalf added to the conversation. The Facebook offensive correspondence was indeed misconduct *in connection with the employment*.

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

DECISION:

The Agency representative's April 18, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw