IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JULIE M LIVERMORE
Claimant

HY-VEE INC
Employer

APPEAL NO. 11A-UI-06339-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/10/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Julie Livermore filed a timely appeal from the May 2, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 9, 2011. Ms. Livermore participated. John Fiorelli of Corporate Cost Control represented the employer and presented testimony through Connie Heidimann and Carolyn Trimble. Exhibits One through Six 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: Julie Livermore was employed by Hy-Vee in Cedar Rapids from 2003 until April 11, 2011, when Store Director Greg Wery discharged her for profane and offensive remarks directed at store staff and management. Ms. Livermore worked as a full-time salad bar clerk for most of her employment. Mr. Wery had just recently joined the Cedar Rapids store. Ms. Livermore's immediate supervisor at the end of the employment was Produce Manager Chris Mumby, who had also just recently joined the Cedar Rapids store.

On April 10, 2011, Ms. Livermore was working with part-time salad bar clerk Carolyn Trimble. Ms. Trimble had just joined the Cedar Rapids store on April 4, 2011. On that day, Ms. Livermore told Ms. Trimble that she needed to take instruction from Ms. Livermore and no one else. Ms. Livermore added that she had been written up by management and that if she got one more strike, she was out. Ms. Livermore told Ms. Trimble that she used to care, but not anymore, "because there are too many idiots working in this store now." Ms. Livermore uttered her comments within earshot of customers. Ms. Trimble had immediately reported the comment to Mr. Mumby and documented it.

The incident on April 10 followed another on April 4. Ms. Livermore was again working with Ms. Trimble. Store Director Greg Wery had approached Ms. Livermore and Ms. Trimble to ask

about a particular food item. As Mr. Wery was walking away, Ms. Livermore said to Ms. Trimble, "What a fucking idiot. If he would just walk back to the cooler, he would see that we don't have any." The comment was in direct reference to Mr. Wery. The comment was made within earshot of customers. Ms. Trimble promptly reported the utterance to Mr. Mumby and documented it.

Within the week Ms. Livermore worked with Ms. Trimble, Ms. Livermore also told Ms. Trimble that another employee was "worthless, a fucking fat bitch, and should go back to the Floral Department where she belongs." To that utterance, Ms. Livermore had added, "That will never happen because all the new dumb fucks that are running this store now." That comment was in reference to Mr. Werr and Mr. Mumby.

These final outbursts followed another incident in February 2011, when a coworker threw away a damaged spatula and Ms. Livermore responded with, "I would like to know who the asshole was who got rid of my spatula." Mr. Wery and Connie Heidemann, human resources manager, counseled Ms. Livermore after that outburst and told her the comment bordered on harassment. They advised Ms. Livermore that they did not want to lose Ms. Livermore, but that the conduct could not be tolerated.

Hy-Vee had a written policy that specifically prohibited profanity or verbal abuse. Ms. Livermore was aware of the policy.

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 evidence establishes no reason whatsoever to disbelieve or discount the testimony of Ms. Trimble. Ms. Livermore's speculation, after the fact, that Ms. Trimble was after her job, is not supported by the evidence. The evidence establishes no ill will between Ms. Trimble and Ms. Livermore and absolutely no reason for Ms. Trimble to conjure bogus allegations about Ms. Livermore. The evidence establishes that the utterances Ms. Trimble reported to the employer and testified to were entirely in keeping with Ms. Livermore's prior documented conduct. Ms. Livermore attempted to submit three exhibits that had nothing to do with the events that factored in her discharge. These exhibits were irrelevant and were not received into evidence.

The profane, offensive remarks Ms. Livermore uttered to Ms. Trimble at Mr. Wery's expense and Mr. Mumby's expense were direct attacks on the authority of those two new managers. Ms. Livermore's motive and goal was to poison Ms. Trimble's perception of those two managers and to see her instead as the authority figure. To make matters worse, the comments were uttered within earshot of customers. Ms. Livermore's conduct was indeed in willful and wanton disregard of the employer's interests and misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

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

DECISION:

The Agency representative's May 2, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw