

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KELLY E BURKS
Claimant

IOWA STAFFING INC
Employer

APPEAL 16A-UI-05017-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/20/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 25, 2016, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 12, 2016. Claimant participated. Employer participated through office manager, Alejandra Rocha, and recruiter, Meagan Bolar. Employer Exhibit One was admitted into evidence with no objection. Employer Exhibit Two was admitted into evidence over claimant's objection. Claimant objected because he disagreed with the exhibit. Claimant's objection was overruled.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed temp-to-hire full-time as a laborer last assigned at MidAmerican Recycling from December 28, 2015, and was separated from the assignment, on March 18, 2016. Claimant had been assigned at MidAmerican Recycling and the prior company for three years. Claimant was also separated from the employer on March 18, 2016. Claimant was separated from the employer for violating handbook policy regarding workplace violence.

The employer has a written workplace violence policy that prohibits violence in the workplace. Employer Exhibit One. The policy provides notice that employees may be discharged for violating the policy. Employer Exhibit One. Claimant was aware of the policy. Employer Exhibit One.

MidAmerican Recycling contacted the employer about an incident that had occurred involving claimant on March 18, 2016. Employer Exhibit Two. On March 18, 2016, claimant cornered a co-worker (Lidia Amaya) and advanced towards her and was grabbing at her body. Employer Exhibit Two. Mr. Gunsolley stated in his written statement that "[Ms. Amaya] was emotionally distraught at this time." Employer Exhibit Two. A MidAmerican Recycling supervisor, Dave Gunsolley, approached and asked claimant to leave. Employer Exhibit Two. Claimant refused

to leave. Employer Exhibit Two. Mr. Gunsolley wrote in his statement that “[claimant] told [Mr. Gunsolley] that the only reason he was grabbing her was that he had dropped his weed, and she would not give it back.” Employer Exhibit Two. Mr. Gunsolley told claimant he would call the police if he did not leave. Employer Exhibit Two. Claimant left, but later came back. Employer Exhibit Two. The assignment again told claimant that if he did not leave they would call the police. Employer Exhibit Two. Claimant then left again. Employer Exhibit Two.

Ms. Bolar spoke with claimant on March 18, 2016, and told him he was discharged from the employer. Claimant was very aggressive with Ms. Bolar. Claimant changed his story about what happened. Claimant used profanity throughout the conversation, including “this is f@#king stupid”. Claimant made other inappropriate comments about Ms. Bolar’s personal life.

Claimant had no prior warnings for workplace violence. Anytime an employee violates the workplace violence to this degree, the employee is discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted.

It is noted that claimant used profanity during the hearing while Ms. Bolar was testifying; however, later during the hearing, claimant denied that he used profanity during the hearing despite this administrative law judge having informed claimant his comment was not appropriate at the time he had made the comment. Claimant’s failure to accurately reflect comments he made during the hearing was taken into account in assessing credibility. This administrative law judge finds the employer’s version of events to be more credible than claimant’s recollection of those events.

Iowa Code § 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.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). "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. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

While the employer did not present Mr. Gunsolley or Ms. Amaya to provide sworn testimony or submit to cross-examination, the combination of Mr. Gunsolley's written statement and Ms. Rocha and Ms. Bolar's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible. Claimant got into an argument with Ms. Amaya at work on March 18, 2016. Claimant "had Lidia cornered in an area where she had no means of egress and was advancing and grabbing towards her mid-section." Employer Exhibit Two. Mr. Gunsolley stated in his written statement that "[Ms. Amaya] was emotionally distraught at this time." Employer Exhibit Two. Mr. Gunsolley had to get between claimant and Ms. Amaya to prevent any further contact by claimant. Employer Exhibit Two. Mr. Gunsolley had to tell claimant to leave more than once and had to threaten to contact the police. Employer Exhibit Two.

Claimant's conduct is considered disqualifying misconduct, even without prior warning. The employer has presented substantial and credible evidence that claimant cornered and was grabbing at Ms. Amaya in a threatening way. The employer has an interest and duty in protecting the safety of all of its employees. Claimant's threat of physical aggression was in violation of known company policy. This behavior was contrary to the best interests of employer and the safety of its employees and the employees of the assignment company. Claimant's conduct is disqualifying misconduct even without prior warning. Benefits are denied.

DECISION:

The April 25, 2016, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs