IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LEAH R BARTON Claimant **DOLGENCORP LLC** Employer	**APPEAL 23A-UI-08262-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/09/23** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Dolgencorp LLC, the employer/appellant,[1] appealed the Iowa Workforce Development (IWD) August 16, 2023 (reference 02) unemployment insurance (UI) decision. The decision allowed Ms. Barton REGULAR (state) UI benefits because IWD concluded the employer dismissed her from work on July 9, 2023 for a reason that did not disqualify her from receiving UI benefits. On August 29, 2023 the Iowa Department of Inspections, Appeals, and Licensing, UI Appeals Bureau mailed a notice of hearing to the employer and Ms. Barton for a telephone hearing scheduled for September 12, 2023.

The undersigned administrative law judge held a telephone hearing on September 12, 2023. The undersigned heard Appeals 23A-UI-08261-DZ-T and 23A-UI-08262-DZ-T appeals together and created one hearing record. The employer participated in the hearing through Bill Cottier, district manager and Chescka Cruz, Equifax hearing representative. Ms. Barton participated in the hearing personally. Mary C. Hamilton, attorney, represented Ms. Barton. The undersigned took official notice of the administrative record.

ISSUES:

Did the employer place Ms. Barton on disciplinary suspension and/or discharge her from employment for disqualifying job-related misconduct?
Did IWD overpay Ms. Barton UI benefits?
If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Barton began working for the employer in 2019. She worked as a full-time lead sales associate. Her employment ended on July 31, 2023.

On June 30, 2023, a customer complained to the employer that Ms. Barton was rude to the customer. Mr. Cottier called the customer and the customer repeated that Ms. Barton was rude. Mr. Cottier reviewed the employer's video footage and concluded that Ms. Barton's body

[1] Appellant is the person or employer who filed the appeal.

language showed she was rude. Mr. Cottier could not see Ms. Barton's face in the video and the video did not include audio. Later that day, the store manager and assistant manager called Ms. Barton into the office. The store manager told Ms. Barton something to the effect of she didn't want to fucking do this and told Ms. Barton that the employer was giving her a written warning for being rude to a customer. Ms. Barton asked for more details about the customer's complaint. The manager and assistant manager did not provide any more details but directed Ms. Barton to sign the warning. Ms. Barton refused because she wanted more detail about the customer's complaint. Ms. Barton did not read the warning. At some point, Ms. Barton said "this is fucking crazy." The meeting ended and Ms. Barton left the office. The same day, the manager reported to Mr. Cottier that Ms. Barton refused to sign the warning, swiped the warning away, said "Fuck Bill (referring to Mr. Cottier) and fuck you (referring to the manager and assistant managers)," and walked out of the meeting. Mr. Cottier suspended Ms. Barton on June 30 for using cursing.

Mr. Cottier sent the matter to the employer's human resources (HR) office for investigation. HR staff never contacted Ms. Barton about the matter. As of about July 17, Mr. Cottier had not heard from the HR office so he called Ms. Barton and told her that she could return to work.

On July 30, the HR office told Mr. Cottier that it had concluded that Ms. Barton's employment should be terminated. The next day, Mr. Cottier called Ms. Barton and told her that her employment was terminated because of her response to the store manager on June 30. Mr. Cottier testified in the hearing that the employer ended Ms. Barton's employment because she had created a hostile work environment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes the employer suspended Ms. Barton from June 30, 2023 through about July 17, 2023 and discharged her from employment on July 31, 2023 for reasons that do not disqualify her from receiving UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

> 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.
>
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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.

The employer has the burden of proof in establishing disqualifying job misconduct.[2] The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.[3] Misconduct must be "substantial" to warrant a denial of job insurance benefits.[4]

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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."[5] However, the claimant's use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct.[6] The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

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."[7] However, one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct.[8] The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this case, the employer suspended Ms. Barton and terminated her employment because she used profanity when she spoke with the manager and assistant manager. Ms. Barton did not direct her profanity to anyone, and it was not accompanied by a threat and said in a confrontational manner. While an employee's use of profanity may constitute misconduct, the employer has not met its burden to establish that Ms. Barton's use of profanity in this case rises to the level of misconduct. The employer has also failed to establish that Ms. Barton's use of profanity created a hostie work environment, particularly given that the store manager also used profanity in the June 30 meeting. Ms. Barton is eligible for UI benefits, as long as no other decision denies her UI benefits.

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[2] *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).
[3] *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).
[4] *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).
[5] Myers v. Emp't Appeal Bd., 462 N.W.2d 734 (Iowa Ct. App. 1990).
[6] See Nolan v. Emp't Appeal Bd., 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing Myers (Mansfield, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").
[7] Myers v. Emp't Appeal Bd., 462 N.W.2d 734 (Iowa Ct. App. 1990).
[8] See Nolan v. Emp't Appeal Bd., 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing Myers (Mansfield, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

Since Ms. Barton is eligible for REGULAR (state) UI benefits based on her how her job ended, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.[9]

DECISION:

The August 16, 2023, (reference 02) UI decision is AFFIRMED. The employer discharged Ms. Barton from employment for a reason that does not disqualify her from receiving UI benefits. Ms. Barton is eligible for UI benefits, as long as no other decision denies her UI benefits.

Daniel Zeno
Administrative Law Judge

September 18, 2023
Decision Dated and Mailed

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[9] *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf or by contacting the District Court Clerk of Court https:///www.iowacourts.gov/iowa-courts/court-directory/.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf o comunicándose con el Tribunal de Distrito Secretario del tribunal https:///www.iowacourts.gov/iowa-courts/court-directory/.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.