

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEON D NUNN
Claimant

APPEAL NO. 13A-UI-02434-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

APAC CUSTOMER SERVICES OF IOWA
c/o TALX UCM SERVICES INC
Employer

OC: 01/20/13
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

APAC Customer Services of Iowa filed a timely appeal from a representative's decision dated February 19, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 27, 2013. Claimant participated. The employer participated by Ms. Turkessa Newsone, Ms. Jackie White and Ms. Milissa Villaltondo. Employer's Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Deon Nunn began employment with APAC Customer Services of Iowa on April 4, 2012. Mr. Nunn was employed as a full-time customer service representative working on a call floor. Mr. Nunn was paid by the hour. His immediate supervisor was Kathy Andrews. Mr. Nunn was discharged on January 21, 2013 for an incident that had taken place on January 10, 2013 on the call floor.

On that day, Ms. Jackie White, a company lead, heard Mr. Nunn state: "No one wants to do their damn job around here." Ms. White attempted to summon Mr. Nunn, however, Mr. Nunn did not respond to Ms. White's summoning him. Ms. White then approached Mr. Nunn and as she approached heard Mr. Nunn refer to her as a "bitch." Mr. Nunn was taken to the company office and then suspended pending further investigation. After considering the witness statements and considering that the claimant had previously been warned on August 12, 2012 for use of profanity, a decision was made to terminate Mr. Nunn from his employment.

Mr. Nunn denies making the statements attributed to him by his employer. Mr. Nunn contends his initial statement was: "No one wants to do their job around here" and denies referring to Ms. White in a derogatory way. It is the claimant's belief that the employer did not take statements from witnesses who were favorable to Mr. Nunn.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 insurance benefits. 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. of Appeals 1992).

In this matter, Mr. Nunn was observed and overheard by Ms. Jackie White, a company lead worker. Ms. White testified that based upon her personal observation, Mr. Nunn did make the statements attributed to him. Ms. White testified that Mr. Nunn did not see Ms. White approach him as he referred to her as a "bitch." Ms. White was unequivocal in her testimony. Based upon the personal observations of the company lead person and the previous warning that had been served upon Mr. Nunn for the use of profanity on the call floor, the employer was reasonable in concluding that Mr. Nunn had violated company policy again and discharged him from employment.

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 the receipt of unemployment insurance benefits. See Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). An isolated instance of vulgarity can constitute misconduct and warrant disqualification from unemployment insurance benefits if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc., 447 N.W.2d 148 (Iowa Ct. of Appeals 1989).

The evidence in the record establishes that the claimant's conduct was a willful disregard of the employer's interests and reasonable standards of behavior that it had a right to expect of its employees under the provisions of the Employment Security Law. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated February 19, 2013, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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