IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

MICHAEL E WOODARD Claimant **PAPER SYSTEMS INC** Employer	**APPEAL 22A-UI-18027-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/11/22** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Michael E. Woodard, filed an appeal from the October 5, 2022, (reference 02) unemployment insurance decision that denied benefits based upon the finding he was discharged for work-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on November 3, 2022. The claimant participated and testified. The employer participated through Vice President Melissa Mauro, Lucas Saunders, Support Coordinator Human Resources and Business Development Stephanie Cunningham, Receptionist Angela Anderson, and General Manager Scott Kitt. Exhibit 1, 2, 3, 4, 5, 6 were received into the record.

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:

The claimant worked as a full-time quality manager from August 27, 2008, until this employment ended on September 12, 2022, when he was terminated. The claimant's immediate supervisor was Operational Manager Jeff Downing.

The employer has a hostile work environment policy. The policy is written to prohibit discriminatory behavior on the bases of protected characteristics. The claimant conceded that although the policy was written to address discriminatory harassment, in practice it had been used more broadly to discourage discourteous or rude behavior. The claimant wrote the policy.

On October 10, 2019, the claimant sent an email to Company President Larry Chase stating he did not realize it was a big deal for a truck to deliver food near the employer's premises for his business. The claimant explained that the truck does not deliver places other than businesses. The claimant then asked if he would prefer he not take delivers at the employer. In response, Mr. Chase said he did not want personal business being run out of the employer's business in

any shape or form. Mr. Chase said he expected this not to reoccur in the future. The employer provided a copy of the email. (Exhibit 3)

On April 26, 2020, Ms. Mauro sent an email to Mr. Downing serving as a verbal warning after an interaction on that date. Specifically, Ms. Mauro asked him a question and the claimant raised his voice and said, “You knew about this and these changes happened a while ago.” (Exhibit 2)

On November 17, 2020, Ms. Mauro sent the claimant an email regarding his communication at attitude at work. Specifically, Ms. Mauro said the claimant shrugged his shoulders and “took a tone” with her. Ms. Mauro stated that this undermined his role as a leader. The employer provided a copy of this email. (Exhibit 2)

On December 30, 2021, Vice President Melissa Mauro sent the claimant an email stating he needed to organize the documents in his office. Ms. Mauro observed the claimant was delegating tasks to support staff that he was responsible for rather than completing these tasks himself. Later that day, the claimant apologized. He said he let his frustration show because he had not yet found the information to her questions. The employer provided copies of these emails. (Exhibit 3)

On March 2, 2022, the employer received a grievance from one of the claimant’s coworkers stating he “exhibits hostile body language.” The claimant credibly denied ever pointing into a coworker’s face.

On March 3, 2022, the claimant met with General Manager Scott Kit and Mr. Downing regarding this grievance. The claimant was told his use of sarcasm, sense of humor and perceived aggressive communication style were raised as issues. The claimant stopped meeting individually with staff. He also generally minimized his interactions with other employees because he was uncertain what any of these vague conclusory remarks meant with any specificity.

On March 18, 2022, Ms. Mauro sent an email to the claimant informing him that he needed to update the emergency action plan. She asked the claimant to update the current plan to have the claimant be responsible for an employee attendance list to be maintained if an emergency occurred and the plant had to be evacuated. During this email conversation, the claimant observed that he had not previously been responsible for this list. Ms. Mauro pointed out that the claimant as quality manager was responsible for the safety of the building.

On July 21, 2022, the employer received a grievance from one of the claimant’s coworkers. The claimant used a rude tone with him according to this employee.

On August 9, 2022, the claimant sent an email to Mr. Saunders and Ms. Kitt expressing that a certain practice was “stupid.” The claimant expressed frustration that several steps were not taken that should have been taken.

On September 8, 2022, the employer received a grievance from one of the claimant’s coworkers because he was rude with him.

On September 12, 2022, Ms. Mauro terminated the claimant’s employment. When asked about the reasons for terminated, Ms. Mauro was unable to point to any specific instance that caused her to terminate the claimant. Rather, Ms. Mauro said it was a culmination of every instance recounted above.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer has failed to meet its burden showing the claimant was discharged for work-related misconduct. Benefits are granted.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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 decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as 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 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. *Id.*. 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The administrative law judge finds the claimant to be more credible than the employer when their testimony varies.

Iowa Admin. Code r.871-24.32(4) and (8) provide:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.
>
> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge finds the employer has failed to meet the burden in Iowa Admin. Code r.871-24.32(4) which requires it to provide the specific reasons for termination. Instead of explaining its reason, the employer has decided to recount every instance in the claimant's term of employment it found objectionable. In addition, Ms. Mauro states that poor performance was also a reason. To the extent Ms. Mauro is saying she contemplated every act recounted in the lengthy submission, he does not find this credible. Indeed, several of these categories of things relate to behavior that could not have possibly been considered because they occurred after his termination. To the extent Ms. Mauro cannot state what specifically led to the claimant's termination, it is impossible to evaluate whether the employer's reason is for a current act or one that is in the past. *See* Iowa Admin. Code r.871-24.32(8) (stating past acts of misconduct are only relevant to the extent they determine the magnitude of the act resulting in termination.)

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.

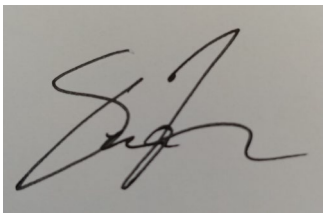
1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors…." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983). While there is no citation for discriminatory content, but there is no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.

To the extent that the employer is contending that the claimant's termination was the result of grievances, as the claimant credibly testified was the employer's reason at factfinding, the administrative law judge similarly finds this not to be misconduct. The record is lacking from any instance even approaching the standard described above regarding expectations of civility. The closest the administrative law judge can find of anything credible is the claimant stating, "This is stupid," in an email. Many of the incidents described as poorly toned or coarse, the employer acknowledges the claimant apologized afterward. Indeed, the claimant credibly asserted he attempted to improve, but conceded he had little idea what they were describing by these broad vague statements. The administrative law judge also stresses that the employer's case is undermined by its witnesses not even being able to articulate what the claimant was doing that was so objectionable on these dates beyond conclusory statements. How can I determine the claimant was fairly warned regarding his tone when the employer cannot even articulate that standard after terminating him? To the extent they do describe them, these actions are not consistent enough and too incredible to believe on this record such as pointing at people or spinning them around and yelling in their face. The record does not establish misconduct in this case. Benefits are granted, provided the claimant is otherwise eligible.

DECISION:

The October 5, 2022, (reference 02) unemployment insurance decision is REVERSED. The claimant was discharged from employment, but the employer has not met its burden to show a specific act motivated its decision to terminate him. Benefits are granted, provided he is otherwise eligible.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

November 22, 2022
Decision Dated and Mailed

smn/scn

APPEAL RIGHTS. If you disagree with the 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.