

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GARY C FREY
Claimant

TURNER CONSTRUCTION COMPANY
Employer

APPEAL 21A-UI-16326-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/11/21
Claimant: Appellant (2)

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant, Gary Frey, appealed the July 22, 2021, (reference 01) unemployment insurance decision that denied benefits based upon finding an April 19, 2021 discharge from work for conduct not in the best interest of the employer. The parties were properly notified of the hearing. A telephone hearing was held on September 28, 2021. The claimant participated and testified, had his attorney present, Mr. Marlon Mormann. Claimant further had witness Mathew Moore (operator) testify and witnesses Chad Avens, and Jeremy Langstrec on the line but not called to testify. The employer did not participate. Judicial notice was taken of the administrative file.

ISSUE:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a laborer foreman from February 10, 2014, until this employment ended on April 19, 2021, when he was discharged.

April 5, 2021, employer received a complaint from an individual that they heard a racial slur come from a group of employees, but could not identify whom stated the slur. Employer called claimant in for a meeting on April 5, 2021, informing claimant of allegation along with the approximate time and location it happened, asking claimant what he knew. Claimant informed employer that he did not say nor hear the racial slur. Claimant told employer since the employees wear a badge that has a tracker in it that reads where they are located on the job site and monitors if they get within six feet of one another (COVID-19 social distance monitoring), the employer could check that against when the incident happened to determine who was in the general area. April 19, 2021, claimant was called in for a meeting with Kendra Fries, onsite human resources manager, and Brian Schmidt, general superintendent, and was informed he was being discharged from employment. Claimant was discharged and asserts he was not told any reasons why and does not know why, other than being told on April 5, 2021 that if he did not tell the employer the name

of the person who stated the racial slur, he would be fired. According to claimant and claimant's witness, seven individuals were fired April 19, 2021.

Claimant requested a copy of the fact finding document and for it to be made a part of the record. Claimant was provided a copy and it is a part of the record. Employer shared with the factfinder that they let claimant go for "misconduct, unethical conduct, harassment, confidentiality, overall behavior that simply doesn't align with Turner core values." It shows the employer conducted an investigation into the incident, and the "outcome of the investigation led" to the separation, but the employer would not be providing information regarding the investigation, such as "notes, summary" etcetera, leaving us not knowing anything about claimant's conduct.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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). 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).

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 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.

There is little information regarding the allegation the employer investigated. A racial slur was said at the workplace. This abhorrent behavior has no place in society. The employer made an affirmative decision to not participate in the hearing. The notice of employer's decision was received September 8, 2021. The reason employer let claimant go is known ("misconduct, unethical conduct, harassment, confidentiality, overall behavior that simply doesn't align with Turner core values"). The conduct is not known. Employer did not share that, either in the fact finding as referenced above nor in the hearing, as they did not participate. Without knowing the conduct, a determination cannot be made as to whether the conduct is disqualifying. An inference cannot be made as to the conduct, as there is insufficient information to draw an inference, without speculating as to what the correct inference one should make regarding the conduct. Employer did not provide information whether claimant stated the slur, heard the slur, failed to report the person who stated the slur, attempted to cover up what happened, was there more than one slur said (whether by one employee or multiple employees), in addition to the slur, was there other conduct (be it additional, different slurs or other acts), or some combination of these or more than this list. Employer has failed to meet their burden of proof in establishing disqualifying job misconduct. Whatever conduct employer believed claimant did to warrant discharge, may have been a good reason for discharge, but by failing to submit evidence as to what the conduct was, no disqualifying misconduct is imposed pursuant to Iowa Code § 96.5(2)a.

DECISION:

The July 22, 2021, (reference 01) unemployment insurance decision is **REVERSED**. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Darrin T. Hamilton
Administrative Law Judge

September 30, 2021
Decision Dated and Mailed

dh/ol