IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ALLEN P ROBERTS Claimant **THE UNIVERSITY OF IOWA** Employer	**APPEAL 15A-UI-11392-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/20/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 6, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 27, 2015. Claimant participated. Employer participated through human resources director, Amy Kirkey and university benefits specialist, Mary Eggenburg.

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 full time as a registrars veterans service coordinator from April 8, 2013, and was separated from employment on September 21, 2015, when he was discharged.

Claimant was also a faculty advisor for a group of students at the University of Iowa that was working with the Student Veterans Association at the University of Minnesota. The University of Iowa was trying to organize an event, but needed the participation from the Student Veterans Association at the University of Minnesota for the event to proceed. Claimant had participated on a couple of phone discussions with the Student Veterans Association at the University of Minnesota. Then claimant received a copy of an e-mail from the president of the Student Veterans Association at the University of Minnesota canceling their participation. There was some more dialog after this e-mail between the two groups, and then a member of the Student Veterans Association at the University of Minnesota sent an e-mail that claimant found insulting. Claimant then responded to this e-mail directly to the member of the Student Veterans Association at the University of Minnesota, but also carbon copied others, including the president of the Student Veterans Association at the University of Minnesota. In this response, claimant stated "I hope you feel like a pussy because I would[.]" Claimant also stated in this e-mail, "you f[@#]king pussies[.]" The president of student veterans association at the University of Minnesota forward the e-mail and a complaint to the Dean of Students at the University of Iowa. The employer discharged claimant for the inappropriate language used in

the e-mail. The e-mail was sent from claimant's e-mail address. The e-mail was sent in claimant's official capacity.

The employer has a University of Iowa Ethics Policy, which provides that all employees are to be respectfully in any communications. Claimant was aware of the policy. The employer also has a progressive disciplinary policy that provides for multiple steps (warnings) prior to discharge. Claimant had no prior disciplinary warnings. The employer discharged claimant without prior warnings because it felt the language in the e-mail rose to a level resulting in the employer bypassing the disciplinary policy.

Claimant does not think the e-mail was appropriate. Claimant has worked with students for decades. Claimant had no prior warnings for profanity. Claimant has used profanity in phone conversations, e-mail, and texting while working for the employer. Claimant was aware of other employee (co-workers) using profanity with e-mail and they were not disciplined.

REASONING AND CONCLUSIONS OF LAW:

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

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 finds claimant's version of events to be more credible than the employer'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:
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> 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.
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the 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.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *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).

In *Myers v Emp't Appeal Bd.*, 462 N.W.2d 736 (Iowa Ct. App. 1990), the court considered whether an isolated instance of profanity and a threat used in the workplace could constitute work-connected misconduct as defined by the unemployment insurance law. While the court ruled that such language could constitute disqualifying misconduct, the court cautioned that the language used must be considered with other relevant factors, including the context in which it was said and the general work environment. *Id*. at 738. Whether the use of improper language

rises to the level of misconduct depends on "the context in which it is said" and the "general work environment." *See Myers,* 462 N.W.2d at 738.

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.

Claimant was discharged after the employer received a complaint about an e-mail sent from his work e-mail address and in his official capacity as an employee. The employer's argument that the e-mail was so outrageous as to result in the disqualification of benefits is not persuasive. Claimant sent his e-mail in response to an e-mail that he found insulting. Although receiving an e-mail that is insulting may be unpleasant, it does not allow an employee to respond in any way the employee sees fit. Claimant does not dispute that the e-mail was inappropriate. Claimant argues that the context of surrounding the e-mail needs to be taken into consideration. It is noted that the e-mail was sent to one person with multiple other individuals copied in on the e-mail. It is also noted that only one person, a person the e-mail was copied to, filed a complaint regarding the e-mail. Claimant had been helping a group of students organize an event that needed the participation of the Student Veterans Association at the University of Minnesota. The Student Veterans Association at the University of Minnesota had agreed to participate, but had recently backed out. Claimant testified that he has worked with the veteran population before and he was trying to stoke the leadership at the University of Minnesota. Claimant further testified that profanity had been used in prior phone conversations about the event. Claimant also testified that he was aware of other co-workers using profanity and they were not disciplined.

Although claimant did use profanity and inappropriate language in an e-mail, because of the context in which the language was used and the general environment of the past conversations, including phone conversations, the employer has not established the conduct was serious or substantial enough to warrant a denial of job insurance benefits. It is also noted that neither party provided a copy of the e-mail as evidence for the hearing.

Furthermore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Had claimant been warned by the employer, he would have had the opportunity to change his behavior. Benefits are allowed.

Even though claimant did use profanity in an e-mail, he did testify that other co-workers have used profanity without discipline. Since the consequence was more severe than other

employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The October 6, 2015, (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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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