

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CATHY DIXON
Claimant

KOHL'S DEPARTMENT STORES INC
Employer

APPEAL 21A-UI-14818-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/28/21
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 filed an appeal from the June 21, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she violated a known rule. The parties were properly notified of the hearing. A telephone hearing was held on August 24, 2021. The claimant participated. The employer participated through Store Manager Wilma Townley. The employer was represented by Unemployment Insurance Representative Ted Valencia. Official notice was taken of the administrative file. Exhibits 1, 2, 3, 4, 5 and 6 were received into the record.

ISSUE:

Whether the claimant's separation is disqualifying?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full time as a center core lead from March 3, 2008, until this employment ended on November 16, 2020, when she was discharged. The claimant's immediate supervisor was Store Manager Wilma Townley.

The employer provided a copy of a portion of its company guidelines, which lists violation of its prohibited harassment policy and improperly treating a customer, associate or non-employee as warranting immediate termination after one occurrence. (Exhibit 5) It did not provide a copy of the policies listed.

On August 28, 2017, the claimant received a verbal warning from Ms. Townley. The verbal warning stemmed from an incident occurring on July 26, 2017. The verbal warning vaguely states two assistant managers spoke with the claimant "in regards to an issue they were made aware of." Those assistant managers instructed the claimant to only speak with members of the management team about the incident. Despite this instruction, the claimant allegedly spoke about the matter with other associates, which according to the verbal warning created an

uncomfortable working environment. The verbal warning states the claimant violated the policy regarding “improperly treating a fellow associate, customer or non-employee.” It adds that the claimant was insubordinate and “act[ed] in conflict with the interest of [the employer.]” The employer provided a copy of this verbal warning. (Exhibit 1) Neither the claimant nor Ms. Townley could provide any specifics as to what occurred on July 26, 2017.

On July 3, 2020, Tami Haffner issued the claimant a counseling form alleging that her performance had been poor the last couple of months. The employer provided a copy of this counseling form. (Exhibit 4) The counseling form broadly states the claimant has been talked to “multiple times about her negativity and inability to keep inappropriate comments to herself.” Ms. Townley said the employer had received a customer complaint stating the claimant had been rude to her. Neither Ms. Townley nor the claimant remembered what specifically the claimant said to the customer to generate the complaint. The claimant was shown video from that day, which did not show she interacted with the customer at issue.

On September 2, 2020, the claimant received a verbal warning from Ms. Townley and Ms. Hafner. The employer provided a copy of this verbal warning. (Exhibit 6) The verbal warning states Ms. Haffner reviewed the policies regarding acceptable behaviors on that date. The verbal warning vaguely states, “There was a concern about her behavior that we discussed with her recently.” Ms. Townley read into the record a statement purportedly written by Store Secretary Kay Swanson. The statement states the claimant complained about Ms. Haffner being “snarky about scanning things twice.” Ms. Townley read another statement into the record purportedly written by Supervisor Meghan Loveretta. In this statement, Ms. Loveretta alleges the claimant said, “Well whatever – she will just have to get over it.” This statement was purportedly made after Ms. Loveretta told the claimant that Ms. Haffner would not be in on that day to talk about a performance deficiency. The statement does not give any more detail about the claimant’s statement. Ms. Haffner told the claimant that is not what she said and felt like it was not an appropriate way to treat management. Ms. Haffner, Ms. Swanson, and Ms. Loveretta were not made available to testify on the date of the hearing. Ms. Townley read a statement into the record purportedly written by Supervisor Melanie Patton. Ms. Patton alleges misconduct that does not have to do with her making inappropriate statements, so this statement is not described in greater detail.

On November 2, 2020, the claimant was accused of working on a watch, in such a way that she violated specific Covid19 guidelines for this type of task. The claimant was issued a warning that same day by Tami Hafner. The employer provided a copy of the disciplinary notice issued to her on that day. (Exhibit 3)

On November 12, 2020, Robert Parker, an African American associate, entered the store and yelled, “I’m black. I’m black.” The claimant asked in response, “Are you black?” Both associates were fairly loud and customers could hear. At this point, the claimant relayed to Mr. Parker that she had to ask an African American customer at a previous job for his photo identification, so that he could buy cigarettes. The claimant said she explained to the customer that she didn’t care if he was purple; she had to perform this task as part of her job with all customers. The claimant relayed this story because she wanted to emphasize that she treated everyone the same regardless of race. Ms. Townley took statements from Mr. Parker, the claimant and another associate and submitted them to the employer’s human resources department.

On November 16, 2020, Ms. Townley issued the claimant a termination notice regarding the incident that occurred on November 12, 2020. The termination notice alleges the claimant made a statement about an associate’s ethnicity. The termination notice states the claimant violated the policy regarding “improperly treating a fellow associate, customer or non-employee.” It adds

she act[ed] in conflict with the interest of [the employer.]” The employer provided a copy of this termination notice. (Exhibit 2)

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.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. 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. An employer has a "right to expect decency and civility from its employees." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990). Profanity or other offensive language in a confrontational, name-calling, or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990), overruling *Budding v. Iowa Dep't of Job Serv.*, 337 N.W.2d 219 (Iowa Ct. App. 1983). "We have recognized that vulgar language in front of customers can constitute misconduct, *Zeches v. Iowa Dep't of Job Serv.*, 333 N.W.2d 735, 736 (Iowa Ct. App. 1983), as well as vulgarities accompanied with a refusal to obey supervisors. *Warrell v. Iowa Dep't of Job Serv.*, 356 N.W.2d 587, 589 (Iowa Ct. App. 1984).

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.

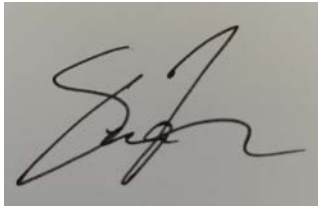
The administrative law judge finds the claimant's statement made on November 12, 2020 to have none of the aggravating factors listed above. The claimant did not curse, use vulgarity or epithets indicating a discriminatory animus. While the employer contends the statement is discriminatory, at most it is what is commonly known as a micro-aggression, meaning the claimant clearly did not intend it to be insulting to Mr. Parker. Quite the contrary, the claimant was awkwardly trying to convey that she treated everyone equally regardless of race.

While the employer contends the incidents in the past are of the same theme, there is insufficient detail regarding these incidents to determine if the discipline related to these incidents placed the claimant on fair notice she could be terminated for a micro-aggression. What little detail the employer provided regarding these incidents is supported by hearsay. This hearsay testimony is insufficient to undermine the claimant's first hand credible testimony that she did not engage in the behavior alleged.

Benefits are granted.

DECISION:

The June 21, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

A handwritten signature in black ink on a light gray background. The signature is stylized and appears to read 'S. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

September 7, 2021
Decision Dated and Mailed

smn/scn