IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

SCOTT MCCUMBER Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL NO. 21A-UI-05367-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/10/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, Scott McCumber, filed a timely appeal from the February 12, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on January 7, 2021 for misconduct in connection with the employment. After due notice was issued, a hearing was held on April 22, 2021. Claimant participated. Christy Chappelear represented the employer and presented additional testimony through Gustavo Canas. Exhibits 1 through 7 and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Tyson Fresh Meats, Inc. as a full-time General Maintenance Technician from 2018 until January 7, 2021, when the employer discharged him from the employment. The claimant's duties involved trouble-shooting problems with machines during the meat-cutting process and preventive maintenance.

There were two incidents close in time that factored in the discharge. The first one came to the employer's attention on January 4, 2020 when an African-American female trainee notified the employer that she was quitting the employment because it was not a good fit. The trainee told the employer the claimant had said, "I'm not your trainer. I don't get paid to be your trainer. You can ask him [the other technician] when he gets back next week." Though the trainee did not name the claimant, the employer determined that the trainee had been working with the claimant during the time in question, while the technician with whom the trainee usually worked was on vacation. While the claimant was in the office to make a petty complaint about another employee getting a weekend off, the employer asked the claimant whether he was the person who had run off the trainee. The claimant admitted he had said what the trainee reported. The claimant added, "She's dirty. She's lower than low. I saved you guys time and money with her."

The claimant asserts in his testimony that he was referring to sexually suggestive comments the trainee made during her time with the claimant. However, the claimant made no mention of the comments when speaking with the employer.

The second incident that factored in the discharge occurred on January 5, 2021, when the claimant violated the safety protocol by failing to wear "hot gloves" to unplug a mechanical slicer from the 480 volt power source. The employer also provided the claimant with a Safety Handbook at the start of the employment and held regular safety meetings. The claimant was aware that he was required to wear "hot gloves" to unplug the slicer from the power source. Out of concern that the claimant might not have followed the lock-out/tag-out procedure, a supervisor intervened and had the claimant stop working on the slicer. The mechanical slicer has been locked-out and tagged-out. However, before the supervisor was assured it was safe to proceed, the claimant recommenced working on the slicer. When the supervisor again intervened, the claimant walked away. The claimant clapped as he walked away. The employer interpreted the clapping as a mocking gesture directed at the supervisor.

The employer provided the claimant with a copy of the Rules of Conduct at the start of the employment. The rules indicated that failure to comply with company safety rules would prompted a written warning and that making malicious statements concerning a coworker would prompt a written warning coupled with a suspension. The rules also indicated that insubordination or refusal to perform assigned work could result in discharge from the employment following an investigation. The rules indicated that two written warnings with suspension or four written warnings for non-attendance issues within a 12-month period would result in discharge from the employment. The rules indicated that one written warning with suspension and three non-suspension warnings would also result in discharge from the employment. The rules indicated that disciplinary action would be based on the seriousness of the violation and the employee prior discipline.

The employer deemed the claimant's interaction with the trainee and his interaction with the supervisor to be harassment. The employer also provided the claimant with the employer's Harassment and Discrimination Policy at the start of the employment.

The employer presents no other bases for the discharge and no history of discipline.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

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).

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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board,* 616 N.W.2d 661 (Iowa 2000). 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See Iowa Administrative Code rule 871-24.32(4).

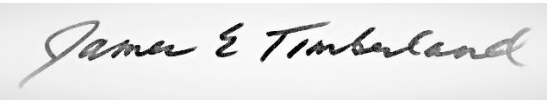
An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *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 (Iowa Ct. App. 1989).

The evidence in the record establishes a discharge for no disqualifying reason. The claimant did not "run off" the trainee. The claimant was intentionally rude. His rudeness did not rise to the level of disqualifying misconduct in connection with the employment. The employer

presented insufficient evidence to prove that the claimant's rudeness was based on the trainee being female or on the trainee being African-American. The claimant's response to the employer's question as to whether the claimant had "run off" the trainee was inappropriate, but did not rise to the level of disqualifying misconduct. The evidence establishes an isolated safety violation based on the claimant's failure to wear hot gloves to disconnect the power to the slicer. The employer presented insufficient evidence to prove that the claimant's clapping as he walked away was a mocking gesture directed at the supervisor. The employer had the ability to present testimony from the supervisor, but elected not to present such testimony. Though it is not determinative, the employer did not follow its own progressive discipline policy and elected to skip steps outlined in the policy when making the decision to discharge the claimant from the employment. The employer, in short, thought the claimant was a jerk and wanted to be rid of him. Such people share many a workplace, but being such is not the same as engaging in disqualifying misconduct in connection with the employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 12, 2021, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



James E. Timberland
Administrative Law Judge

August 3, 2021
Decision Dated and Mailed

jet/mh