

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**INEZ Y JINEZ**  
Claimant

**KRAFT FOODS GROUP INC**  
Employer

**APPEAL 16A-UI-04964-DB-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/03/16**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the April 22, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her being discharged for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 13, 2016. The claimant, Inez Y. Jinez, participated personally. The employer, Kraft Foods Group, Inc., participated through Human Resources Generalist Kelsey Smith.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production team member on the production line. Her employment began on June 15, 2015 and ended on March 31, 2016, when she was discharged from employment.

In the middle of March, 2016 there was an incident with claimant and another co-worker on the production line. Tabra Bonney was the co-worker. Claimant and Ms. Bonney did not get along. Claimant tried not to interact with Ms. Bonney unless it was necessary for work. On this day Ms. Bonney threw a cardboard box at her. Claimant asked her supervisor to move to a different part of the line and she was moved.

On March 17, 2016, claimant was then put back on the same line next to Ms. Bonney. Claimant asked Ms. Bonney not to blow meat onto the ground where she was cleaning. Ms. Bonney then used profanity at the claimant, called her names and threatened to fight and injure her. Ms. Bonney claims that claimant threatened to fight her as well and used profanity at her. Ms. Bonney did not testify at the hearing. Claimant denies that she ever threatened to fight

Ms. Bonney and denies that she used profanity at her. Claimant reported the incident to her supervisor.

Following this incident the employer obtained statements from Ms. Bonney and from claimant. Employer believed that both parties were in the wrong and believed that both claimant and Ms. Bonney were making threats and using profane language to each other. No independent witness statements were obtained. No video camera footage was able to be reviewed. Both claimant and Ms. Bonney received discipline for this incident but because claimant had already received a third warning she was discharged and Ms. Bonney received a third warning.

Employer has a progressive disciplinary policy wherein employees are discharged on their fourth warning. However, an incident can be escalated to a level three warning without having to have a level one or level two issued.

Claimant's previous disciplinary history included one warning for a verbal altercation with another co-worker on February 4, 2016. This incident was considered a level three warning. Claimant was discharged due to the final incident because she was already on a level three warning.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

As a preliminary matter, I find that the claimant did not quit. Claimant was discharged from employment.

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:
  - 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.

- 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.

Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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.*

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See Iowa Code § 17A.14 (1).

In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon hearsay statements, the administrative law judge concludes that the claimant's testimony is credible.

Claimant was discharged for her comments she made when another co-worker approached her in a threatening manner and claimant believed she was going to fight her. Claimant testified that she did not use profanity during this incident nor make any threats. Her comments were not inappropriate. Further, claimant went directly to her supervisor and reported the incident.

Ms. Bonney did not testify regarding the incident. It is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). However, claimant did not use profanity or threats of violence against Ms. Bonney.

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 has not met the burden of proof to establish that claimant engaged in job-related misconduct sufficient to deny her benefits. As such, claimant's separation from employment was not for a disqualifying reason. Benefits are allowed.

#### **DECISION:**

The April 22, 2016, (reference 01) unemployment insurance decision is reversed. 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.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/css