

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DONICA S JUERGENS
Claimant

APPEAL 19A-UI-08951-JC

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE COUNTY
Employer

OC: 10/20/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant, Donica S. Juergens, established a claim for unemployment insurance benefits with an effective date of October 20, 2019. She appealed the November 8, 2019 (reference 01) initial decision which denied benefits based upon her separation with this employer, Dubuque County. Ms. Juergens also requested an in-person hearing. A notice of hearing was mailed to both parties on November 27, 2019, for an in person hearing to be held at the Dubuque local office at 11:30 a.m. on December 27, 2019.

Prior to the in-person hearing, a pre-hearing conference was conducted on December 11, 2019 to address the employer's postponement request and exhibits, and an order was prepared.

An in-person hearing was then held in Dubuque, Iowa on December 27, 2019. The claimant participated personally and in person. Dylan Link and Patty Walen also appeared in person, and testified on behalf of the claimant. Debra Juergens, mother of claimant, attended in person as an observer only.

The employer participated by telephone and was represented by Cris Kirsch, administrator. Marni Schmit, nurse manager, also testified on behalf of the employer and by phone.

Employer Exhibits 1-8 and Claimant Exhibits A-E were admitted. The claimant also submitted a USB drive, which was not admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed part-time as a service worker beginning in 2012 and was separated from employment on October 22, 2019, when she was discharged (Employer Exhibit 1).

When the claimant was hired and throughout her employment, she received training on the employer's policies (Employer Exhibit 5). These included the general employment policies for Dubuque County (Employer Exhibit 4), which expects the workplace be free of racial based, derogatory or degrading jokes (Employer Exhibit 4).

The claimant was discharged based upon an employee report of the claimant making inappropriate comments to co-workers. Prior to discharge, the claimant and her union representative participated in a Loudermill hearing (Walen testimony, Employer Exhibit 2). The employer received a complaint from an employee's mother, who was also a co-worker (Kirsch testimony, Employer Exhibit 8). It was reported the claimant called her co-worker a "lazy, Black bitch" in the break room on October 20, 2019 (Employer Exhibit 8). When questioned, the claimant denied calling her co-worker "lazy" but admitted to the comment (Employer Exhibit 2, Claimant Exhibit A). She indicated the comment was made as a joke, in response to a side conversation about dating, which occurred between the claimant and co-worker in the kitchen, and which Mr. Link overheard (Juergens testimony, Link testimony).

The employer also received a complaint that the claimant called a co-worker, Ariana, "tinsel tits" (Employer Exhibit 3). The claimant denied making the comment or knowing what the term meant, (Juergens testimony) and the employer stated it moved forward with discharge based upon the other comment made, which the claimant admitted.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job related misconduct. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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).

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, including the context in which it is said, and the general work environment." *Meyers 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. IDJS*,

333 N.W.2d 735 (Iowa App. 1983). An offensive comment can be misconduct even where the target of the comments are not present. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). The consideration of these factors can take into account the general work environment and other factors as well.

In this case, the claimant was discharged based upon a comment made in the workplace to a co-worker. Aggravating factors include the comment being made in front of another co-worker, profanity, and discriminatory content. Even in the absence of calling the co-worker lazy, the comment made was blatantly offensive. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the administrative law judge concludes the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

DECISION:

The unemployment insurance decision dated November 8, 2019, (reference 01) is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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