

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN L RASMUSSEN
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 19A-UI-05287-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/02/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On July 2, 2019, the claimant filed an appeal from the June 28, 2019, (reference 01) unemployment insurance decision that denied benefits based on his discharge for insubordination. The parties were properly notified about the hearing. A telephone hearing was held on July 26, 2019. Claimant participated and testified. Employer participated through Store Manager Linda Van Roekel and Area Supervisor Julie McKee.

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 began working for employer on September 15, 2010. Claimant last worked as a full-time food service leader. Claimant was separated from employment on June 5, 2019, when he was discharged.

On June 5, 2019, one of claimant's assignments was to wipe off a shelf. VanRoekel noticed the shelf had some dust on the end. She went over to claimant and asked if he cleaned the shelf. Claimant responded he had. VanRoekel then showed him the dust on the end of her fingers and told him he missed some. When VanRoekel came back a few minutes later claimant told her that if she ever came "at [him] like that again [he would] never clean a goddamn shelf again." This was said in the kitchen area, which is open to the rest of the store. A customer overheard and asked to speak to VanRoekel. The customer was upset and informed VanRoekel she was going to complain to the corporate office. The customer did file a complaint with the corporate office, which also alleged she heard claimant refer to VanRoekel as a "punk ass bitch." VanRoekel had not heard this comment.

This was not the first incident of this type involving the claimant. On October 10, 2018, he was issued a written warning after getting into a verbal altercation with a coworker, then yelling at VanRoekel when she tried to stop it. This type of behavior violates the employer's code of

conduct and employee conduct policy, which prohibit profanity and require employees to be appropriate. The decision was then made to discharge claimant from employment. Claimant denied using profanity and stated there were other witnesses to this, but acknowledged that he did not ask the employer to speak to those witnesses.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

There is a dispute between claimant and VanRoekel as to whether claimant used inappropriate language on June 5, 2019. The fact that VanRoekel and a customer reported hearing the same comment from claimant about cleaning the shelves lends credibility to VanRoekel's testimony. Further lending credibility to that testimony is that fact that she freely admitted to not hearing the inappropriate name the customer reported hearing. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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.

In the present case, claimant swore at his immediate supervisor after being given a directive and then, out of her earshot, but within the earshot of a customer, called her a profane name. Conflicts in the workplace are bound to occur and it is normal that an employee may become upset with a supervisor. It is also understandable that claimant was frustrated with the situation. However, frustration does not excuse claimant’s behavior. Calling a supervisor a profane name and swearing at her, especially where a customer can hear, violates commonly held workplace standards and the employer’s policies. Claimant’s conduct on June 5, 2019 is considered disqualifying misconduct. Benefits are denied.

DECISION:

The June 28, 2019, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant is deemed eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs