IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOAN E ROBERTS Claimant **FLINT CLIFFS MANUFACTURING CORP** Employer	**APPEAL 17A-UI-08159-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/09/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:
The employer filed an appeal from the August 1, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 14, 2017. The claimant participated personally and was represented by John F. Doak, attorney at law. Linda Metcalf, employee, testified on behalf of the claimant too. The employer participated through Scott E. Schroeder, attorney at law. Employer witnesses included Carol Smith, Russ Dunkin and Steve Standard. John Schultz, owner, attended as an observer only.

Claimant Exhibits A through E, and Employer Exhibits 1 and 2 were admitted into evidence. (Employer Exhibit 1 consisted of a jump drive containing video footage, an email and voicemail.) 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.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct or did the claimant voluntarily quit the employment with good cause attributable to the employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 quality manager and was separated from employment on July 10, 2017. The evidence is disputed as to whether the claimant quit the employment or was discharged by the employer.

As the quality manager, the claimant worked with the welding team and supervisor to ensure items being produced for clients were meeting customer specifications and expectations. The claimant had the authority to stop production, if needed, and she did so on Saturday, July 8, 2017. She notified welding supervisor, Russ Dunkin, and intended to follow up with him. On Monday, July 10, 2017, the claimant made Steve Standard, vice president of sales, aware that she had stopped production over the weekend and explained why. He informed her that he would have the customer come in and check on the product. Later, she was confronted by Mr. Dunkin about why she had stopped production.

The conversation occurred in open work space, and captured by video surveillance footage (Employer Exhibit 1). Audio content was not recorded, but a review of the footage presented, showed the claimant and Mr. Dunkin, standing around a large table or cart, several feet away from each, at adjacent sides of the table (Employer Exhibit 1). Throughout the conversation, both parties were animated, with their arms pointing and moving (Employer Exhibit 1). The claimant alleged Mr. Dunkin "got in her face" but the video footage furnished does not show Mr. Dunkin in the claimant's personal space or stepping toward her in any sort of threatening manner (Employer Exhibit 1). The conversation ended with the parties each walking away. The undisputed evidence is that both parties were frustrated and Mr. Dunkin said something to the effect of, "do you know what your problem is? You don't know welding" and referenced the claimant being unqualified.

The claimant interpreted Mr. Dunkin's comments to be challenging her competency and she became upset, before going to Mr. Standard's office. What the claimant actually said to Mr. Standard is also disputed: The claimant asserted she declared she was "done being disrespected" before turning around and leaving. Mr. Standard recalled the comments of the claimant to be to the effect of "I don't give a fuck. These fuckers can go to hell" and referenced how the employer would be at a loss if she was not there to perform an upcoming audit (Employer Exhibit 1, email of Standard). The claimant then clocked out, and left her shift early.

Once home, the claimant called office manager, Carol Smith, to report the incident. Ms. Smith responded to the claimant's call around 10:00 a.m. and at that time, the claimant clarified she was not quitting. There was also a request for a meeting with management.. Ms. Smith told the claimant to stay home, calm down and she would get back to her. Around 2:00 p.m., Ms. Smith called the claimant back and said the employer was "accepting your quit as termination." The claimant had no prior warnings related to her conduct in the workplace. Her last reported performance evaluation was in 2013 and overall positive (Claimant Exhibit C).

The evidence is disputed as to whether the employer was aware all of the incidents the claimant had with her male co-workers, but the employer acknowledged it had "dealt with her sexual harassment claims" in the past (Employer Exhibit 2). The employer has a predominantly male workforce. The claimant had no prior issues with Mr. Dunkin until July 10, 2017, but had been subjected to repeated comments of a sexual or vulgar nature based upon her gender. For example, the claimant told by her male co-worker to "dress appropriately for the visit ummm hmmm smiles a little visual distraction excites the mind" (Email from co-worker to claimant, Claimant Exhibit B). She also reported that between 2015 and 2017, she repeatedly notified Ms. Smith about ongoing issues with her male co-workers but they continued. These comments included a co-worker in September 2015 offering "free tongue rides" to the claimant, and making references to her bending over, a different co-worker trying to hug her and telling her he loved her in 2016, a third male co-worker telling the claimant she was a "bitch, a whore and a c—t" in late 2016, and a fourth co-worker telling the claimant she had a "sweet looking ass" and questioning her about whether she wore a bra.

The administrative record reflects that claimant has received unemployment benefits in the amount of $4,095.00, since filing a claim with an effective date of July 9, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Carol Smith, office manager, attended on behalf of the employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit, but was discharged, for no disqualifying reason.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code § 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code § 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section § 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the employer has the burden of proving that a claimant's department from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: Iowa Code section § 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. *Voluntary quitting.* If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a "termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Furthermore, voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5.

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). Administrative agencies are not bound by the

technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

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 credible evidence presented does not support that the claimant intended to quit the employment, but that the employer would not allow her to continue working. The administrative law judge is further persuaded the claimant lacked a requisite intent to quit, based on her communications with the employer. While the claimant may have told Mr. Standard she was "done being disrespected", and left upset during her shift, she soon after clarified to Ms. Smith that she had not quit. The administrative law judge is not persuaded the claimant's conduct in Mr. Standard's office was intended to sever the employment, but rather an expression of frustration. This was further supported when the claimant was advised by Ms. Smith to stay home and cool down.

Arguably, if the claimant had quit already, there was no need for her to stay home because she had ended the employment and would not be returning. Instead, the employer called the claimant later that day and informed her that her resignation was being accepted as a termination of employment, even though the claimant directly told Ms. Smith she did not quit the employer shortly after leaving the office upset. In this case, the claimant did not have the option of remaining employed nor did she express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In a discharge case, the employer has the burden of proof to establish the claimant was separated for 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 the 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. 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 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, the claimant's use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct. See *Nolan v. Emp't Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfiled, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency."). In this case, the claimant was discharged after going to Mr. Standard's office, speaking to him, and leaving her shift early on July 10, 2017. The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct.

Even if the claimant's conversation with Mr. Standard included the profanities reported, the conversation was private, not in front of employees or customers, and essentially a one-time outburst of emotion. The administrative law judge does not condone the language reportedly used by the claimant, but does recognize the claimant was repeatedly subjected to inappropriate comments by her male co-workers, based on her gender. It is unsettling that the claimant was discharged for a single outburst in light of the comments to which she was subjected to in the workplace by her male co-workers.

An employee should not have to endure repeated bullying, vulgar language or sexual propositions. The conduct the claimant was subjected to was severe and recurring. An employee also has the right to expect that management, when notified about such conduct, will take reasonable steps to end the harassment. A reasonable person would conclude that the working conditions the claimant was subjected to were intolerable and were not effectively remedied at the point of separation. Mr. Dunkin's comments to the claimant on July 10, 2017, may not have been vulgar or sexual in nature but given the claimant's history with her male co-workers, it is understandable why the claimant would be upset by a male co-worker telling her she didn't know how to do her job or challenging her competency, in light of the history of treatment by multiple male co-workers.

Therefore, based on the evidence presented, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Benefits are allowed, provided the claimant is otherwise eligible.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the

parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The August 1, 2017, (reference 01) decision is affirmed. The claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn