

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY J OLEARY
Claimant

DAHL MOTORS DAVENPORT INC
Employer

APPEAL 16A-UI-13049-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/06/16
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 5, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 28, 2016. Claimant participated. Employer did not register for the hearing and did not participate.

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 was employed full-time as an inventory manager from April 13, 2007, and was separated from employment on November 4, 2016, when he was discharged.

On November 1, 2016, the general sales manager, Tim Thompson called claimant into the office and told him he was being removed from his duties as the inventory manager. Mr. Thompson stated he was doing a good job, except for the used car portion of the job. Mr. Thompson told claimant to use some of his vacation time and take the rest of the week off and they would talk at the end of the week. Claimant then went home, but he thought Mr. Thompson would keep him as a salesman or some other position; claimant had prior sales experience. While claimant was off work he became more upset about the situation the more he thought about it. Claimant believed it was the used car manager Dave Budd that was instrumental in claimant losing the inventory manager position. On November 2, 2016, claimant sent Mr. Budd a text message stating "f**k off". Mr. Budd did not respond to claimant's text message. Claimant does not think it was appropriate to text that to Mr. Budd.

On November 4, 2016, claimant met with Mr. Thompson. Mr. Thompson told claimant he was discharged due to the text message he sent to Mr. Budd. Mr. Thompson stated he had to support management and cannot condone another employee speaking that way to management.

Claimant did not have any prior warnings for using profanity. It is common place at the employer for other employees to use profanity on a daily basis in the work place. On several occasions, claimant would walk into Mr. Budd's office and Mr. Budd would say to him, "Has anyone told you f**k you today? Well let me be the first." Mr. Budd said this to claimant at least half a dozen times. Claimant is not aware of any employee being disciplined for using profanity. If a manager heard profanity, they would just tell the employee to watch their language, but no formal discipline was given.

REASONING AND CONCLUSIONS OF LAW:

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

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 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.

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 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).

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. If management wishes to be treated with respect, it must enforce respectful treatment amongst coworkers and supervisors and apply those expectations consistently throughout the chain of command. Even though claimant sent Mr. Budd a text message stating "f**k off", since the consequence (discharge) was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Furthermore, since Mr. Budd on approximately six occasions said to claimant, "Has anyone told you f**k you today? Well let me be the first" with no repercussions, claimant's sole frustrated outburst on November 2, 2016 to Mr. Budd does not rise to the level of disqualification. Benefits are allowed.

DECISION:

The December 5, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs