

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY A GLEASON
Claimant

NORTHWEST RESPIRATORY SERVICES
Employer

APPEAL 18A-UI-06848-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/03/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 21, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for using profane language. The parties were properly notified of the hearing. A telephone hearing was held on July 12, 2018. The claimant, Timothy A. Gleason, participated. The employer, Northwest Respiratory Services, L.L.C., participated through Mark Breon, Regional Operations Manager; and Patrick Culhane, Branch Manager. Employer's Exhibits 1 through 4 was received and admitted into the record without objection.

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, most recently as a service technician, from March 16, 2015, until June 4, 2018, when he was discharged. On May 7, 2018, Breon held a conference call with the Des Moines office where claimant worked. During this call, Breon told all employees that profanity was not acceptable at work. He explained that if anyone used profanity at work, there would be consequences. On May 15, claimant got into a verbal argument with coworker Don. During the argument, both claimant and Don used foul language. This incident was reported to Breon the day it occurred. Later that day, claimant again used profanity. Breon commenced an investigation into claimant's behavior. He interviewed the branch manager and Darci Wolfe, and he also spoke to employees who witnessed what had occurred. Breon came to the Des Moines office on June 4, 2018, and discharged claimant for what had occurred on May 15. Claimant had been warned verbally in the past about using profanity at work. He was not aware his job was in jeopardy due to his use of profanity, and profanity was common in the workplace.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged from employment for a current act of misconduct. Benefits are allowed, provided he is otherwise eligible.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't*

Appeal Bd., 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

In this case, the final incident occurred on May 15, 2018. Breon was notified immediately, and he completed his investigation two days later. Claimant was not discharged from employment until over two weeks following the conclusion of the investigation. The administrative law judge determines that claimant was not discharged from employment for a current act of misconduct. Benefits are allowed.

DECISION:

The June 21, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/rvs