

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MARK D MEYERS**  
Claimant

**IKAN MARKETING INC**  
Employer

**APPEAL 18A-UI-08823-AW-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/19/17  
Claimant: Appellant (1)**

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Iowa Code § 96.5(2)(a) – Discharge for Misconduct  
Iowa Admin Code r. 871-24.32(1)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Mark Meyers, Claimant, filed an appeal from the August 13, 2018, (reference 01) unemployment insurance decision that denied benefits because claimant was discharged from work with Ikan Marketing, Inc. for insubordination. The parties were properly notified of the hearing. A telephone hearing was held on September 10, 2018 at 9:00 a.m. Claimant participated. Employer participated through Markus Frese, Treasurer. Larry Struellner was a witness for claimant. Employer's Exhibit 1 was admitted.

**ISSUE:**

Whether Claimant's separation was a discharge 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 a Telephone Sales Representative for Ikan Marketing, Inc., an outbound telemarketing company, from June 26, 2017 until his employment ended effective July 6, 2018. (Frese Testimony) Claimant's work schedule was Monday through Friday from 8:00 a.m. until 4:30 p.m. (Frese Testimony) Claimant reported to Rita Emerson-Suchomel, Site Manager. (Frese Testimony)

Claimant did not work on July 4, 2018; it was a paid holiday. (Claimant's Testimony) That day claimant made numerous calls to his supervisor, Rita. (Exhibit 1) Claimant spoke to Rita at approximately 4:16 p.m. and reported that he would not be at work the following day. (Exhibit 1) Rita believed claimant was intoxicated. (Exhibit 1) Claimant used profanity to Rita and ended the call by hanging up on Rita. (Exhibit 1) Claimant called a few more times that evening, but Rita did not answer the calls. (Exhibit 1) Claimant's wife, who also works for Ikan Marketing, called Rita at approximately 7:48 p.m. and reported that claimant told her she had been fired. (Exhibit 1) Rita told claimant's wife that she had not been fired and she should report to work the next day. (Exhibit 1)

On Thursday, July 5, 2018, claimant was scheduled to work but called in before his shift started and reported that his clothes were wet and he would be in after they dried. (Exhibit 1; Claimant's Testimony) Claimant did not report to work on July 5th. (Frese Testimony; Claimant's

Testimony) On Friday, July 6, 2018, claimant was scheduled and reported to work. (Claimant Testimony) That morning, a coworker told Claimant that Rita's husband told a third party that he was going to hurt or shoot claimant for threatening his wife, Rita. (Claimant Testimony; Struellner Testimony) Rita's husband is not an employee of Ikan Marketing. (Frese Testimony) Upon arriving at work, claimant yelled at Rita while asking about the number of points he had accrued under the employer's point-based disciplinary system. (Exhibit 1) Claimant asked Rita about her husband's alleged threat and then stated he was not working that day and left work. (Exhibit 1; Claimant Testimony)

On Monday, July 9, 2018, Rita reported these incidents to Amy Detemore, General Manager, via email. (Frese Testimony) The employer also received a letter via certified mail from claimant dated July 10, 2018. (Frese Testimony) The employer reviewed this correspondence and conducted an investigation by interviewing the claimant and Rita via telephone. (Frese Testimony) The employer concluded that claimant had used profanity and was belligerent and disrespectful to his supervisor, Rita. (Frese Testimony) On July 17, 2018, the employer decided to discharge claimant from his employment due to insubordination and informed claimant of his termination. (Frese Testimony)

Claimant was scheduled to work Saturday, July 7, 2018; Monday July 9, 2018 through Friday, July 13, 2018; Monday, July 16, 2018 and Tuesday July 17, 2018. (Claimant Testimony) Claimant did not work any of these dates. (Claimant's Testimony) Claimant informed the employer that he would not be at work these days by following the company's policy and stated the reason for his absence was he felt there was a credible and imminent threat to his personal safety. (Claimant's Testimony) Claimant did not report the threat to law enforcement. (Claimant's Testimony)

#### **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 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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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.

Further, 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). 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. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

"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. 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." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). 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). Likewise, the repetition of vulgarities can elevate a minor peccadillo to an act of willful misconduct. *Carpenter v. Iowa Dep't of Job Serv.*, 401 N.W.2d 242, 245-46 (Iowa Ct. App. 1986).

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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.*

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I reviewed the exhibit submitted by the employer. I find the employer's version of events to be more credible than the claimant's version of those events. Claimant testified that he never used profanity or threatened his supervisor during his telephone calls on July 4, 2018; however, he alleges that he truly feared threats from his supervisor's husband based on that very conduct. (Claimant's Testimony) If claimant had not used profanity or threatened his supervisor, then he would have no reason to fear harm from his supervisor's husband. Claimant offers no other reason why his supervisor's husband would threaten him. (Claimant's Testimony) Claimant further testified he felt there was an imminent threat to his personal safety, but never reported this threat to law enforcement. (Claimant's Testimony) Claimant testified that he believed the issue would be resolved by upper level management and, thus, sent a certified letter to the general manager. (Claimant's Testimony) Claimant's version of events is not credible.

Claimant used profanity and yelled at his direct supervisor during a telephone call and yelled at his supervisor in person at their workplace two days later. Claimant acted in willful disregard of his employer's interest and disregarded the standards of behavior which an employer has the right to expect from its employees. Claimant's actions constitute disqualifying job-related misconduct.

**DECISION:**

The August 13, 2018, (reference 1) unemployment insurance decision is affirmed. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Decision Dated and Mailed

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