

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ERIK SMITH
Claimant

ARCH INC
Employer

APPEAL 16A-UI-12328-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/23/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 9, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for conduct not in the best interest of his employer. The parties were properly notified of the hearing. A telephone hearing was held on December 5, 2016. The claimant, Erik Smith, participated. The employer, Arch, Inc., participated through Devin Land, community leader. Employer's Exhibits 1 through 8 were 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 part time, most recently as an assistant, from March 25, 2016, until October 24, 2016, when he was discharged.

As an assistant, claimant provided direct care to adults with intellectual disabilities. On October 21, claimant was working with a client who had gone into the basement of the home, where he was going through belongings that were not his. After claimant redirected him to come upstairs, the client became angry and used a racial slur toward claimant. The parties' accounts of what transpired after this event differ. Claimant testified that he responded to this incident calmly by educating the resident about the meaning of the racial slur. According to claimant, he then asked the other staff-members if it would be alright for him to remove himself from the environment temporarily. Once the other staff-members said this was alright, claimant left the premises. At some point, claimant testified, he blacked out and punched a wall in the home. When claimant recovered from his blackout, he found himself on the phone with the employer reporting the interaction he had with the resident. Once claimant returned and joined his coworkers and the clients he was employed to serve, he continued working and provided direct care for the individual who used the slur against him. Claimant testified that the environment

was not affected by what transpired that evening, though at least one person asked him if he was okay after he came inside.

Land testified that the employees who were present reported that claimant became noticeably angry and upset, punched a hole in the wall, and left the scene. According to Land, everyone in the household was agitated by what happened. The employer provided an email account of the incident from two other assistants, Eric Plaut and Melissa Peters. (Exhibits 5 and 6) Peters confirms claimant's statement that he defined the racial slur for the individual, but she states that he then excused himself, punched the wall, and went outside. When claimant returned, he sat in the recliner and took a nap until contacted by Sara Ellet, the employer's director of professional services. (Exhibit 6) Plaut states that the client who used the racial slur was upset by claimant's behavior. (Exhibit 5)

Claimant was discharged for displaying aggression, leaving the house, and failing to control his emotional state. (Exhibit 8) Land stressed that claimant's position charges him with the direct care for a vulnerable population, and his behavior on October 21 placed this population in jeopardy. Land also testified that claimant is routinely providing direct services one-on-one to clients, and so walking out is unacceptable behavior. Neither claimant nor Land was aware of any prior instance of the client using derogatory or racially-charged language toward anyone.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

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).

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). Failure to sign a written reprimand acknowledging receipt constitutes job misconduct as a matter of law. *Green v Iowa Dep't of Job Serv.*, 299 N.W.2d 651 (Iowa 1980). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer provided more credible testimony than claimant regarding the events of October 21, 2016. The administrative law judge does not believe claimant's testimony that he blacked out and does not recall punching the wall of the home. Additionally, the administrative law judge does not believe that claimant had permission and approval from his coworkers when he walked out of the house that day. Rather, the combination of Land's testimony and the written statements from Plaut and Peters establish that claimant was angry and departed from his work area without approval, hitting the wall on his way out the door.

No employee should be subjected to racial slurs while working, regardless of the background or intellectual capacity of the individual using the slur. However, claimant was in a position of responsibility for the individual who spoke the slur to him, and his reaction to the individual's behavior was in deliberate disregard of the employer's interest in maintaining a safe residence for the individuals it served and providing them with care and supervision. Claimant punched a wall in front of clients, an act that at minimum would place the client in fear of claimant and his

anger. Additionally, he abandoned his responsibility for the clients he served when he walked out of the house, and the employer is reasonably concerned about how claimant might react in a one-on-one situation going forward. Claimant's actions amount to misconduct even without prior warning, due to the nature of his position and the population he served. The employer has established that claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld.

DECISION:

The November 9, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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