

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

SCOTT A EVERETT
Claimant

CLEMONS INC
Employer

APPEAL 23A-UI-02140-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/29/23
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Scott A. Everett, filed an appeal from the February 16, 2023, (reference 01) unemployment insurance decision that denied benefits effective January 30, 2023 based upon the conclusion he was discharged from work due to violating a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on March 16, 2023. The claimant participated. The employer participated through Human Resources Manager Jodi Mumma, General Manager Scott Brown, General Sales Manager Ryan Strovers, Parts Manager Brandon Holley, and Parts Person Leticia Singh. Administrative Law Judge Duane Golden observed the hearing. Exhibits 1, 2, 3, and 4 were received into the record.

ISSUE:

Whether the claimant's separation from work was disqualifying?

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 parts manager from August 23, 2021, until this employment ended on January 30, 2023, when he was terminated. The claimant's immediate supervisor was General Manager Scott Brown. The claimant worked a set schedule from 8:00 a.m. to 5:00 p.m. Monday through Friday. As the parts manager, the claimant did not have the ability to terminate Parts Person Leticia Singh or Evangelina Singh, but he would have been their direct supervisor. The claimant also hired both of them.

The claimant has atrial fibrillation which causes him to have a red face more readily than the public, especially when he is experiencing stress.

The employer provided a copy of its employee conduct policy. The employee conduct policy forbids "[u]sing abusive or threatening language at any time during working hours or while on premises owned or occupied by the [employer.]" The claimant acknowledged receipt of the policy. The employer provided copies of the claimant's history, which shows he completed training regarding all policies on January 26, 2023 and January 27, 2023. (Exhibit 2)

On January 11, 2023, General Manager Scott Brown received complaints from various staff regarding the claimant's alleged use of profanity and hanging up on staff. Neither Mr. Brown nor Jodi Mumma could give specific names, dates, or allegations regarding any of these complaints. During the hearing, the claimant admitted to hanging up on Parts Manager Brandon Holley as part of an inside joke. Mr. Holley denied being one of the employees who brought an internal complaint against the claimant. Leticia Singh offered that she was one of the individuals who complained. She said the claimant used the word "fuck" regularly and gave the examples of, "Will you fucking push that button?" She also said the claimant may have said the word "bitch" as he was walking away from her. She could not be sure if the statement was directed to her or when this was allegedly said. The claimant admitted he may have said "son of a bitch" about earlier in his employment.

On January 12, 2023, Mr. Brown and Human Resources Manager Jodi Mumma met with the claimant regarding the complaints received on January 11, 2023. This was the first conversation the claimant had with management regarding his alleged behavior. The claimant was not given specific descriptions of the allegations brought against him.

On January 26, 2023, General Sales Manager Ryan Strovers noticed the claimant standing next to the door going to the parts room. When Logan (last name unknown) approached, the claimant pulled him into the parts room and told him to keep Service Advisor Jordan (last name unknown) out of the parts room. The claimant explained that due to confusion a customer's card was charged, had a refund issued and was re-charged. The claimant went on to say that he could have addressed the situation on his own very quickly. He said, "We have fucking people who don't need to be fucking involved. Keep Jordan out of my fucking parts room. Keep these people out of my fucking parts room." Mr. Strovers acknowledged on the hearing record that the service advisor and others should not be in the parts room because it can lead to overcrowding. The claimant was not yelling, but his voice was such that an older customer around the corner likely heard him. After this conversation occurred, the claimant called Leticia Singh into the parts room with Mr. Strovers. The claimant then corrected Leticia Singh for getting Jordan involved in the sale. Leticia Singh replied that she got Jordan (last name unknown) involved because he made the sale. Mr. Strovers agreed and said that was the right thing to do since all transactions must be made on the same terminal. The claimant went on to stress that in the future Leticia Singh should ask him for help rather than from Jordan (last name unknown) or others. Mr. Strovers repeated that he believed Leticia Singh did the correct thing. As Mr. Strovers was leaving, the claimant exclaimed, "Makes me want to scream."

On January 27, 2023, the claimant was instructing Evangelina Singh regarding working on separate part orders. Evangelina Singh was having difficulty understanding how the claimant wanted it to be done. The claimant became frustrated with the situation. He exclaimed that he attempted to teach Leticia Singh how to do it as well and she never was able to understand. The claimant went on to say if the Evangelina Singh did not figure out how to do it correctly, then he does not need either one of them. Evangelina Singh replied that the claimant could fire her, but she reminded him that Leticia Singh was on contract. Evangelina Singh then filed an internal handwritten complaint describing the incident internally with management.

On January 30, 2023, the employer terminated the claimant due to behavioral incidents described in the previous four paragraphs. The employer's witnesses acknowledged that the use of profanity occurs fairly frequently on the employer's premises. It also acknowledged that it has not disciplined other employees for cursing. During the hearing they argued the claimant's cursing threatened or was more directed at a specific target than the generalized cursing commonly heard on premises.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the employer has failed to meet its burden of showing the claimant was discharged according to a “Knowing violation of a reasonable and uniformly enforced rule of an employer” under Iowa Code section 96.5(2)d(2).

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 employer testimony that cursing or profanity was not used on premises to be not credible. To the extent any testimony was given on this point, it was given by someone who acknowledges not knowing the working environment in the area the claimant worked. All other employer witnesses acknowledged occasional cursing. He further finds the employer’s allegation that this cursing was directed to a particular on a particular date not credible because no specific examples have been given.

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 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 Code section 96.5(2)b, c and d provide:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such

substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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). 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). The "question of whether the use of improper language in the workplace is misconduct is nearly

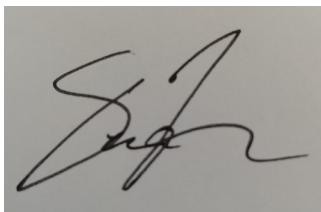
always a fact question. It must be considered with other relevant factors....” *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor’s authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983). While there is no citation for discriminatory content, but there is no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.

The cursing that the employer credibly offers evidence on occurred on January 26, 2023. The employer’s own exhibit acknowledges the claimant’s efforts to keep this from the eyes and ears of the public. He did not yell. He pulled the individuals into the parts room. The employer contends the claimant’s cursing was done in a threatening or abusive manner, but it cannot give a single instance of this occurring with any specificity. While the administrative law judge is not condoning the use of profanity, it must be acknowledged the profound impact regular cursing in the same workplace has on the employer’s case. This is even more so because the employer’s own exhibit confirms the claimant’s allegation that he only underwent training regarding its policies that same day or the next day. At a minimum, the employer has failed to show it enforced its policy regarding language in the workplace in a reasonable and evenhanded manner under Iowa Code section 96.5(2)d(2). Benefits are granted, provided he is otherwise eligible.

DECISION:

The February 16, 2023, (reference 01) unemployment insurance decision is REVERSED. The employer failed to meet its burden that it terminated the claimant for a, “Knowing violation of a reasonable and uniformly enforced rule of an employer” under Iowa Code section 96.5(2)d(2).



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

April 4, 2023
Decision Dated and Mailed

smn/mh

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.