IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

MARLIN DEVAN
Claimant

ABSOLUTE FLAVORS LLC
SMOKEY D'S BBQ
Employer

APPEAL NO: 12A-UI-09127-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/08/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Marlin L. Devan (claimant) appealed a representative's July 27, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Absolute Flavors, L.L.C. / Smokey D's BBQ (employer). After hearing notices were mailed to the parties' last known addresses of record, an in-person hearing was held on August 29, 2012. The claimant participated in the hearing. Jeff Wilkerson appeared on the employer's behalf and presented testimony from one other witness, Sherry Warth. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits denied.

FINDINGS OF FACT:

The claimant started working for the employer on October 12, 2010. Since May 2012 he worked part-time (approximately 30 hours per week) as a cook/prep worker/line worker/cleaner at the employer's restaurant location at which Wilkerson was manager. His last day of work was July 6, 2012. The employer discharged him on July 9, 2012. The stated reason for the discharge was the claimant's behavior in an incident on July 6.

Sometime around 11:30 a.m., after the start of the midday rush, the claimant came to the line between where Wilkerson and another employee were working. The claimant grabbed a bag of buns that the other employee had been using. The other employee reacted by telling the claimant not to "grab the f - - - ing bag." The claimant responded by yelling back at the other employee, including "who the f - - - do you think you are?" Wilkerson began interjecting,

saying, "Watch your mouth," and ""Knock it off," and finally, "Shut up." The claimant responded to Wilkerson by saying that Wilkerson was being "f - - - ing disrespectful," and "who the f - - - do you think you are?" In all, the claimant used the "f-word" five times, at least twice directed at Wilkerson. The claimant was yelling loud enough that a clerk out at the cash register could hear what was being said, and there were customers who were closer to the line than the clerk, who reacted as having heard the exchange.

The exchange ended when Wilkerson asked the claimant, "Do you want to go?" The claimant responded, "No," and things settled down for the rest of the shift. After the shift and after reflecting on the situation, Wilkerson determined that the behavior could not be tolerated and determined to discharge the claimant, which he did when the claimant came in for his next shift on July 9.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa 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. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). The claimant's use of vulgar language and yelling toward his manager shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's July 27, 2012 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 6, 2012. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw