**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **MELISSA D MONTGOMERY**<br>Claimant<br><br>**THE AMERICAN BOTTLING COMPANY**<br>Employer | **APPEAL 16A-UI-02517-DB-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 01/31/16**<br>**Claimant: Appellant (1)** |

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the February 19, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment for job-related misconduct. The parties were properly notified about the hearing. A telephone hearing was held on March 21, 2016. Claimant, Melissa D. Montgomery, participated personally. Employer, The American Bottling Company, participated through Associate Human Resource Manager Stephanie Dixon and Operations Manager Tim Couch. Employer's Exhibits 1 – 7 were admitted.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a forklift operator from January 30, 2005 to February 1, 2016. Claimant was discharged from employment.

On or about January 26, 2016, the claimant found out that a co-worker, Jill Brown, had been posting defamatory statements about her on Facebook which eluded to the fact that claimant was using drugs and that Ms. Brown wanted to throat punch the claimant. This post on Facebook was "liked" by claimant's supervisor. When another co-worker told claimant these posts had been put on the internet, claimant became upset. While the claimant was on a break in the break room she called her husband to discuss the defamatory statements that were being written about her by Ms. Brown. During this telephone conversation the claimant's husband stated something to the effect that "maybe this co-worker needed to be knocked on the head." Claimant agreed and said something to the effect that "Well that may very well be what she needs is knocked on her head." These comments were overheard by other co-workers and reported to Ms. Brown.

Ms. Brown then discussed these comments with Associate Human Resource Manager Stephanie Dixon. Ms. Dixon and Operations Manager Tim Couch decided to do an investigation into the matter. They took a statement from claimant and a statement from Ms. Brown. They also interviewed witnesses in the break room, one of which confirmed that claimant said Ms. Brown needed to be knocked on her head. Claimant was then put on a suspension for her comments in the break room. As claimant was being walked out of the building by a union steward, Ms. Dixon, and Mr. Couch she made threats stating that "Ms. Brown needed to be taken off of the schedule because she was not going to be there the next day; that claimant knew where Ms. Brown lived and knew where her mother lived." The employer considered these threats against Ms. Brown as well in deciding to discharge the claimant.

The employer has a policy against workplace violence. See Exhibit 3. This policy was contained in the employee handbook which the claimant had knowledge of. See Exhibit 1 and 2. Claimant had received previous disciplinary actions for use of her cell phone and absenteeism. In January of 2015, the claimant received a three-day suspension for refusing orders from a direct supervisor and yelling at co-workers in the workplace. After a grievance was filed, this disciplinary action in January of 2015 was reduced to a written warning. The last-chance agreement was also rescinded as part of the grievance settlement.

Prior to the claimant's suspension Ms. Brown passed claimant in a hallway and pushed her slightly out of the way and called her a profane name. Claimant reported this to Mr. Couch. There have been further incidents of employees using profanity, yelling, or fighting on the job. These employees were not discharged for their actions on the job. One incident involved two workers fighting on the dock; one incident involved a co-worker, Ed Jessup, getting up close to claimant's face and yelling at her that he wanted to bash her face in; another incident involved a male employee hitting a female employee; and co-workers made derogatory comments to claimant about the race of her husband. It is unknown if these co-workers received any disciplinary actions against them. Ms. Dixon and Mr. Couch terminated the claimant's employment because of the severity of the threats against a co-worker and the fact that the claimant had been disciplined approximately a year prior for her comments towards co-workers. The employer believed that claimant was on a last-chance agreement, but she was not.

**REASONING AND CONCLUSIONS OF LAW:**

As a preliminary matter, I find that the claimant did not quit. Therefore this must be analyzed as a discharge case.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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(4) provides:

> (4) Report required. The claimant's statement and the 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). 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). Further, 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). 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).

Employers generally have an interest in protecting the safety of all of its employees and invitees. Claimant's remarks in the break room while she was speaking on the phone to her husband was merely an isolated incident of poor judgment and not conduct which would disqualify her from receiving unemployment insurance benefits.

However, the employer has presented substantial and credible evidence that claimant threatened to physically assault Ms. Brown when she was being escorted out of the building. Claimant confirms these comments were made. The Iowa Court of Appeals has determined that "[t]he 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." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

In this case, the claimant went beyond profanity or offensive language and made a threat of physical violence in a confrontational and disrespectful context towards Ms. Brown when she was being walked out of the building. The claimant's threat of harm is against the employer's best interest and a disregard of the reasonable conduct an employer has a right to expect of its employees. Further, claimant's threats of physical aggression against Ms. Brown were in violation of specific work rules and against commonly known acceptable standards of work behavior. This behavior was contrary to the best interests of the employer and the safety of its employees and is disqualifying misconduct event *without prior warning*. Claimant's past discipline is not relevant because her actions while she was being escorted out of the building were disqualifying even if she had no prior disciplinary action against her.

However, the claimant's argument regarding the employer's lax enforcement of its workplace violence policy is relevant to this determination as an argument of disparate treatment. Claimant's past discipline is relevant to this analysis. Claimant testified to several specific incidents where other co-workers had engaged in fighting; threats of violence and use of profanity in the workplace. Claimant's testimony was credible. However, no witnesses testified to what, if any, discipline these co-workers received for their actions, only that they remained employed with the company. It is possible that these employees did not have previous disciplinary actions against them like claimant had previously received in January of 2015. Claimant could have subpoenaed these witnesses to testify but did not. Claimant's termination was in part, based upon her previous actions in January of 2015 which involved yelling, insubordination, and use of profanity in the workplace. The administrative law judge concludes that the claimant has failed to provide any direct evidence that the employer's workplace violence policy was administered against her any differently than her co-workers, given her previous discipline in January of 2015.

Claimant reported to Mr. Couch that Ms. Brown had physically assaulted her and pushed her out of the way and called her a profane name. Mr. Couch investigated this incident and did not testify as to what disciplinary action, if any, was given to Ms. Brown as a result of this due to confidentiality of Ms. Brown's employment file. There was no testimony as to what previous disciplinary history Ms. Brown had against her, if any. However, Ms. Dixon and Mr. Couch agreed that this final incident in January of 2016 warranted discharge of the claimant instead of her receiving a suspension or written warning due to her *previous* history of misconduct on the job during the January of 2015 incident in which she received a disciplinary warning. Because

there was no evidence presented of whether Ms. Brown had a similar disciplinary background with this employer, claimant has not shown that she was treated differently than Ms. Brown. As such, benefits are denied.

**DECISION:**

The February 19, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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