IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOSHUA J MOHR Claimant **FARNER-BOCKEN CO** Employer	**APPEAL 16A-UI-05103-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/10/16** **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 April 29, 2016, (reference 01) unemployment insurance decision that denied benefits based upon him being discharged for job related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 16, 2016. The claimant, Joshua J. Mohr, participated personally. The employer, Farner-Bocken Co., participated through Human Resources Director Amy Ross and Driver Supervisor Kevin Smejkal. Employer's Exhibits 1 through 8 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 route delivery driver. Claimant began his employment on July 15, 2015 and his employment ended on April 7, 2016. Claimant's job duties included driving products that had been ordered by clients to their place of business. He was also responsible for taking inventory of the product that he made deliveries of.

On October 22, 2015 claimant was a no-call/no-show. He received a written warning for this incident. See Exhibit 6.

On November 20, 2015 claimant was upset that he had two extra stops on his route. He did not count the products that he left during his first stop and learned of this during his second stop. He was very rude and upsetting to the client contact at his second stop named Ashley. Ashley recorded the conversation because of his attitude with her. Ashley contacted the employer and reported this incident to Mr. Smejkal. Claimant received a written warning regarding this incident because he was stating to Ashley that he should not have to run these stops blind and was complaining about the company. See Exhibit 5.

On February 6, 2016 claimant was given another written warning for his attitude and behavior with another client. On February 10, 2016 claimant delivered to a client named Sheri. During this delivery he went through a door that Sheri had asked him not to go through; was two hours late for the delivery; argued with her about being two hours late for the delivery; told her to talk to her cashier about why he was delivering through the side door; and told her to call corporate if there was a problem with the way he ran his route. She reported that he was very rude to her. Mr. Smejkal spoke to claimant about his actions and had him apologize to this client.

The final incident occurred on April 7, 2016 when claimant called Mr. Smejkal and spoke to him about when he would get a raise. Mr. Smejkal reported that his evaluation would be at his nine-month anniversary date and a raise would not be given until his one-year anniversary date. Claimant had previously received two $0.27 raises during his three-month evaluation and his six-month evaluation process.

During this telephone conversation claimant told Mr. Smejkal that he did not know why anyone would want to work at Farner-Bocken; began complaining about the wages; stated that this company is a joke; and that it is the truth. Claimant also used profanity when he was speaking to Mr. Smejkal on the telephone. Claimant then hung up the telephone on Mr. Smejkal.

Following this conversation the claimant then called Betty Onken, who works for the payroll department of the company. Claimant wanted to request new W-4 forms. Claimant stated that he couldn't believe that the company did not have this request process online. He stated that the company was not up to speed with the times. When Ms. Onken tried to fax the form to him the fax did not work. Ms. Onken called him back and claimant stated that the company's equipment is junk and the fax does not work. He also complained to Ms. Onken about how the company was bad and the wages were bad. Ms. Onken reported this to her supervisor and completed a statement on April 7, 2016 regarding the two telephone conversations.

Mr. Smejkal was told about the conversation with Ms. Onken and decided to discuss this matter with the claimant. Mr. Smejkal met the claimant after he finished his route. He asked the claimant to come out back to his van to discuss the telephone calls with Ms. Onken and the telephone call with himself that occurred that day. During the conversation claimant continued to argue with his supervisor. Mr. Smejkal confronted him about his bad attitude and his use of profanity with him on the telephone earlier. Claimant again used profanity at his supervisor and continued to argue about how bad the company was. Mr. Smejkal discharged him from employment after this conversation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from employment was a discharge for job related misconduct. Benefits are denied.

As a preliminary matter, the claimant did not voluntarily quit, he was discharged from employment. Therefore, this must be analyzed as a discharge case.

It is my duty, as the administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*,

548 N.W.2d 162, 163 (Iowa App. 1996). 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). I assessed the credibility of the witnesses who testified during the hearing and considering the applicable factors listed above, and using my own common sense and experience, I find the Mr. Smejkal's version of events to be more credible than the claimant's recollection of those events. I further find that Ms. Onken's written statement, given its consistency with the way claimant was speaking to Mr. Smejkal minutes prior to this conversation, credible as well.

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).

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.

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). Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa App. 1985).

Claimant had a history of complaining to clients about his job and the way the company was run. See Exhibit 5. Claimant also had a history of being rude and disrespectful to clients of the company. See Exhibit 5 and 4. His statements to clients were against the employer's best interest. Claimant had been warned on numerous occasions about his attitude and negative comments about the company. He had been asked by Mr. Smejkal not to use profane language and make negative comments about the company. Claimant received a copy of the employee handbook and policies therein. See Exhibit 8. Employer's conduct policies state that the company could discipline him, including termination, for the use of profanity or abusive language while on duty or on company premises and insubordination. See Exhibit 7. Claimant knew what standard of behavior was expected of him and disregarded these rules anyway. His refusal to not disparage the company and use profanity is not reasonable under the circumstances.

The final incident consisting of using profanity at his supervisor and making disparaging comments about the company to his supervisor and Ms. Onken, combined with the fact that claimant had been warned on numerous other occasions for violating the employer's policies for this same issue constitutes an intentional and substantial disregard of the employer's interests and amounts to misconduct. This was not simply one occasion of negligence but a pattern of his deliberate disregard of the employer's interests. As such, benefits must be denied.

DECISION:

The April 29, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for 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.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs