

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ARGENIS R MARCOS
Claimant

APPEAL 17A-UI-06798-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SARA LEE CORP
Employer

**OC: 06/04/17
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

Sara Lee Corp. (employer) filed an appeal from the June 26, 2017, reference 03, unemployment insurance decision that allowed benefits based upon the determination it discharged Argenis R. Marcos (claimant) but failed to show he engaged in disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 18, 2017. The claimant participated. The employer participated through Human Resource Manager II Tim Steffen. Spanish interpretation was provided by Laura (employee number 8970) and Paloma (employee number 11274) from CTS Language Link. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, specifically the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

Is the claimant able to and available for work?

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 Maintenance Parts Room Worker beginning on April 7, 2003, and was separated from employment on June 7, 2017, when he was discharged. The employer has an anti-harassment policy that puts employees on notice, that amongst other things, they must treat each other with respect.

On or about May 23, 2017, Allen English, Maintenance Third Shift Team Lead, reported to Human Resource Manager II Tim Steffen incidents that had occurred between himself and the claimant. He accused the claimant of intentionally breaking his glasses. He also recounted a conversation he had with the claimant in which the claimant said “fuck you” and gave him the middle finger. English wrote a statement about the incidents.

Steffen investigated the incidents. As part of his investigation, he interviewed the claimant and took a written statement. The claimant reported that English had called him a “mother fucker” and threatened to have management fire the claimant. The claimant admitted he then told English “fuck you” and gave him the middle finger. The claimant and English were both suspended pending further investigation on May 24, 2017.

Steffen also spoke with other employees who reported other incidents of inappropriate conduct in which the claimant had engaged. The employer made the decision to discharge both English and the claimant. However, before English could be discharged, he submitted his resignation. Steffen contacted the claimant on June 7, 2017 and informed him that he was being discharged for the incident with English.

The claimant was initially hired to work by the employer (account number 061825). In 2012, the employer changed its name to Hillshire Brands Company. In August 2014, the employer became a subsidiary of Tyson Foods, Inc. The employer’s account number is the only account reporting wages paid to the claimant during his base year and during his employment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,341.00, since filing a claim with an effective date of June 4, 2017, for the four weeks ending July 1, 2017. The administrative record also establishes that the employer provided written documentation for the fact-finding interview that gave a description of the incident, the date of the incident, and a copy of the policy the claimant violated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

“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 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). 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). "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 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).

The claimant acknowledged he used profanity and gave English the middle finger during a verbal altercation. The claimant also acknowledged he knew it was a violation of the employer's policy but believed it would result in a lesser discipline. The claimant's use of profanity was in a confrontational and disrespectful context. Additionally, his actions displayed a deliberate disregard of the standards of behavior an employer can reasonably expect from its employees. The claimant's conduct is disqualifying misconduct even without prior warning. Accordingly, benefits are denied.

As benefits are denied, the issue of whether the claimant is able to and available for work is moot.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.7. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. Participation is defined as "submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer." Iowa Admin. Code r. 871-24.10. The documents provided must, at a minimum, must include the date of the incident, details of the incident, and the policy violated by the employee. *Id.*

In this case, the claimant has received benefits but was not eligible for those benefits. The documents submitted by the employer for the fact-finding interview include the date of the final incident, a description of the incident that occurred, and a copy of the policy the claimant violated. This information, if un rebutted, would have been sufficient to result in a denial of benefits. The employer is deemed to have participated in the fact-finding interview. As a result,

the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The June 26, 2017, reference 03, unemployment insurance decision is reversed. The 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. As benefits are denied, the issue of the claimant's ability to and availability for work is moot. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,341.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/rvs