

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PAUL A KITT
Claimant

HY-VEE INC
Employer

APPEAL 24A-UI-01513-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/07/24
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Paul A. Kitt, the claimant/appellant,¹ appealed the Iowa Workforce Development (IWD) February 2, 2024 (reference 01) unemployment insurance (UI) decision. IWD denied Mr. Kitt REGULAR (state) UI benefits because IWD concluded the employer discharged him from work on December 24, 2023 for conduct not in the best interest of the employer. On February 13, 2024, the Iowa Department of Inspections, Appeals, and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to Mr. Kitt and the employer for a telephone hearing scheduled for February 28, 2024.

The administrative law judge held a telephone hearing on February 28, 2024. Mr. Kitt participated in the hearing personally. The employer participated in the hearing through Gregory Nystrom, human resources manager, Juan Ramos, manager of home health and wellness, and Barbara Buss, hearing representative from Experian/Corporate Cost Control. The administrative law judge admitted Employer's Exhibit 1 as evidence.

ISSUE:

Did the employer discharge Mr. Kitt from employment for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Kitt began working for the employer in 2018. He worked as a part-time online produce shopper. His employment ended on December 24, 2023.

On December 24, 2023, the employer assigned Mr. Kitt to work in the refrigeration zone. Mr. Kitt usually worked in the produce zone, but the employer would move him, and other employees, to different zones based on business need. Mr. Kitt was upset by his assignment because the refrigeration zone was behind in their work. He was frustrated that the employer had not moved him to the refrigeration zone sooner.

¹ Claimant is the person who applied for UI benefits. Appellant is the person or employer who appealed.

To express his emotions, Mr. Kitt began to aggressively move his shopping totes around. Mr. Kitt also crossed out his name, and the word “produce” in his job title on the daily schedule, so his job title read “Aisles Online Shopper” instead of “Aisles Online Produce Shopper.”² Mr. Kitt also wrote the word “bitch” next to his name.³ Mr. Kitt also wrote on the back page of the daily schedule: “To hell with anything the bitch says does or wants Fuck him.”⁴ Mr. Kitt thinks of himself in the third person and wrote the text on the front and back of the schedule to himself.

The department assistant manager called Mr. Ramos, who was the then department manager, and told him about the situation. At that time, the assistant manager did not know about Mr. Kitt’s words on the back page of the schedule. Mr. Ramos pulled Mr. Kitt aside and asked him what was going on. Mr. Kitt explained that he felt picked on because he was being forced to work in a zone that he didn’t want to work in. Mr. Ramos told Mr. Kitt that he should not use profanity and the employer assigns employees to job tasks based on business need.

Mr. Kitt’s workday ended, and he left work. After Mr. Kitt’s workday ended Mr. Ramos and the assistant manager discovered Mr. Kitt’s words on the back page of the schedule. Mr. Ramos discussed the matter with Mr. Nystrom. The employer’s policy prohibits using profanity and provides that the employer may discipline up to, and including, terminating employment any employee who violates the policy. Mr. Kitt acknowledged receiving a copy of the policy in 2019. Mr. Ramos and Mr. Nystrom agreed to terminate Mr. Kitt’s employment for violating the employer’s policy. Mr. Ramos spoke with Mr. Kitt on the phone on December 24 and told him that his employment was terminated for violating the employer’s policy prohibiting using profanity.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Mr. Kitt from employment on December 24, 2023 for disqualifying, job-related misconduct, so Mr. Kitt is not eligible for UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

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,

² Employer’s Exhibit 1, page 14.

³ *Id.*

⁴ *Id.*

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.

The employer has the burden of proof in establishing disqualifying job misconduct.⁵ The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.⁶ Misconduct must be “substantial” to warrant a denial of job insurance benefits.⁷

The employer may establish reasonable work rules, including ones related to profanity, and expect employees to abide by them. 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.”⁸ However, the claimant’s use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct.⁹ The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this case, Mr. Kitt used profanity at work to express his frustration about his work assignment. Mr. Kitt explained that he thinks about himself in the third person so his words on the front page and back page of the schedule were to himself. However, it is reasonable for the employer, and Mr. Kitt’s former co-workers, to understand Mr. Kitt’s words to be referring to someone other than Mr. Kitt. The employer reasonably concluded that Mr. Kitt’s profanity was directed at another person, and it was confrontational and name-calling. This is disqualifying, job-related misconduct. Since the employer has established disqualifying, job-related misconduct on the part of Mr. Kitt, he is not eligible for UI benefits.

⁵ *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

⁶ *Infante v. Iowa Dep’t of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁷ *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

⁸ *Myers v. Emp’t Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

⁹ See *Nolan v. Emp’t Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfield, J., dissenting) (finding the matter to be an issue of fact “entrusted to the agency.”).

DECISION:

The February 2, 2024 (reference 01) UI decision is AFFIRMED. The employer discharged Mr. Kitt from employment on December 24, 2023 for disqualifying, job-related misconduct. Mr. Kitt is not eligible for UI benefits until he has worked in and been paid wages for insured work equal to ten times his weekly UI benefit amount, as long as no other decision denies him UI benefits.



Daniel Zeno
Administrative Law Judge

March 4, 2024
Decision Dated and Mailed

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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
6200 Park Avenue Suite 100
Des Moines IA 50321
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
6200 Park Avenue Suite 100
Des Moines IA 50321
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.