IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BRANDON R THOMAS
Claimant

HY-VEE INC
Employer

APPEAL NO: 19A-UI-00865-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/06/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the January 24, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 13, 2019. The claimant participated personally. The employer participated through Judy Berry, hearing representative for Corporate Cost Control. Mike Whitten, Tammy Freeman, Raylyn Smith, Michelle Millang, and Dusty Grim testified for the employer.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-4 were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 service worker in the bakery plant and was separated from employment on January 8, 2019, when he was discharged.

When the claimant was hired, he was trained on employer rules and procedures, which prohibit threats or harassment. He signed off on understanding the policies at the time of hire. Even though the claimant had prior conflict with other employees (Employer Exhibits 1-4), he had no discipline, and the employer asserted the final incident was severe enough to warrant immediate discharge without prior warnings.

Prior to January 7, 2019, the claimant had repeatedly notified the employer about issues when working with his co-worker, Tina, who would make comments such as “you’re not doing your fucking job” to him. Frequently, he and Tina would not have to work together, but were both present on January 7, 2019 when assigned to do “thumbprint cookies”, which is labor intensive. Neither Tina nor the claimant was happy about the assignment and their mood soured. The claimant suggested to Tina that she do the test bake and he would then do the cleaning. She responded “I’ll do my fucking job when I want.” The claimant admitted he responded with something to the effect of, “look me in the eyes, you fucking bitch.” Shortly thereafter, he self-reported to Mr. Whitten that he and Tina were not getting along.

Thereafter, the claimant returned to his work station and was approached by his co-worker, Melvin who told the claimant he couldn’t speak to a lady like he had. The claimant responded by saying “I don’t give a fuck. It’s 2019.” The disputed evidence is whether the claimant also made a comment that was interpreted to be threatening of Tina. According to Ms. Freeman, who was approximately four or five feet away, she heard the claimant say, “she’s lucky she’s still breathing.” Ms. Smith, another employee stated she heard the same comment. They told Tina who then reported the comment to the employer.

The claimant denied making any comment to Melvin about Tina being lucky that she was still breathing. He did reference Tina being lucky she had a job to a co-worker Jered and noted the bakery plant was also quite loud. When interviewed by the employer, Melvin stated he did not hear the claimant make a comment about breathing and declined to participate in the hearing or provide a written statement. The employer specified the claimant was discharged not for the profanity use but the alleged breathing comment, which was interpreted as a threat.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,323.00, since filing a claim with an effective date of January 6, 2019. The administrative record also establishes that the employer did participate in the January 23, 2019 fact-finding interview. Mike Whitten and Michelle Millang attended.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa unemployment insurance 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 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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

This case rests on the credibility of the parties. It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; 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. *Id*.

In this case, the claimant denied making the comment which led to discharge. The co-worker to whom the comment was allegedly made denied hearing the comment when interviewed by the employer, and did not participate in the hearing. In contrast, the employer relied upon two employees who were at least four feet away in the loud bakery, who reportedly heard the comment. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. It is true 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). 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. See *Nolan v. Emp't Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfiled, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

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

The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe, or threatening conduct in the workplace, in an era where violence in the workplace is real. However, the employer has failed to establish by a preponderance of the evidence that the claimant's actions on January 7, 2019 violated the employer's harassment or threatening conduct policy. The credible evidence presented is the claimant had not been previously counseled for similar conduct, nor had a pattern of outbursts or unprofessional conduct.

Both the claimant and his co-worker, Tina, exchanged profanities while frustrated at work on January 7, 2019. Thereafter, the claimant proactively notified management they were having issues getting along, as he had done in the past. When his co-worker, Melvin came over and scolded him for speaking to a woman as he had, he responded with more profanity and that it was 2019. While these comments were not professional, they were said only to Melvin, in a loud bakery plant, and unaccompanied by any threats or aggressive behavior. The claimant denied making any threat about Tina being lucky she was still breathing to Melvin. Melvin when questioned by the employer, denied hearing such a comment from the claimant. In contrast, the two witnesses who reportedly heard the comment were several feet away from the claimant and Melvin. When considering the claimant's denial under oath, in addition to Melvin denying to the employer hearing the comment, when compared to the testimony of Ms. Smith and Ms. Freeman, who were several feet away and not part of the conversation, the administrative law judge is persuaded the claimant did not make a threatening comment to the effect of "she is lucky to be breathing."

The administrative law judge does not condone the claimant's language in the workplace on January 7, 2019. However, it cannot be ignored that his co-worker, Tina, also used similar language without consequence. Based on the evidence presented, the administrative law judge concludes the employer has failed to establish by a preponderance of the evidence that the claimant was discharged for a final, current act of misconduct. The question before the

administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges for the employer are moot.

DECISION:

The January 24, 2019, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn