IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RAYMOND P DONAT Claimant **GLOBAL PROCESSING INC** Employer	**APPEAL 16A-UI-05381-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/24/16** **Claimant: Appellant (2)**

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 May 10, 2016 (reference 01) unemployment insurance decision that denied benefits based upon him being discharged for using profane language on the job. The parties were properly notified of the hearing. A telephone hearing was held on May 25, 2016. The claimant, Raymond P. Donat, participated personally. The employer, Global Processing, Inc., participated through Owner Dave Wilcox; Plant Manager Lynn Davis; and General Laborer Scott Richter. Claimant's Exhibits A and B were admitted. Employer's Exhibits One and Two 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 general laborer from April 28, 2014 until his employment ended on April 21, 2016. Claimant's job duties included filling totes with beans; loading trucks for customers; cleaning; stacking totes when they were full; and other various jobs. There were only three other persons who worked with claimant; Dave Wilcox, Lynn Davis, and Scott Richter. Each of these three persons was claimant's supervisor in some sort of capacity. Mr. Richter was in charge of telling claimant what time he was to arrive for work the next day. Claimant's start time varied depending on the needs of the company and as instructed by Mr. Richter.

This employer has no written policy regarding conduct in the workplace. This employer has no written policy regarding discipline. Claimant was discharged by Mr. Wilcox on April 21, 2016. Mr. Wilcox testified that the discharge was based upon claimant's tardiness, his use of profanity, his insubordination, his belligerence, his theft of gas, and personal use of a company vehicle.

On April 21, 2016, claimant and Mr. Wilcox were working within ten feet of each other and claimant was in charge of operating a hand crank to stop the flow of beans. There is a specific weight that must be filled into the totes. Claimant had numerous problems in the past being

able to operate the hand crank so that the totes had the correct weight in them. Mr. Wilcox became upset that claimant was overloading the totes and spoke to claimant about this. His tone of voice was loud and he was yelling. Claimant responded that there were two other employees available to check the bags for quality assurance and they should be checking the bags to ensure the weight was not too heavy. Mr. Wilcox became irate when claimant made this comment, grabbed him by the shoulder, put a finger in his chest, and stated "I am going to kick your fucking ass." Claimant responded back to Mr. Wilcox "Are you threatening me again Dave?" Mr. Wilcox then told claimant that he was fired. Claimant went into the office, told Mr. Davis what had happened, and told Mr. Richter as he left that he was fired. The following day claimant went to the Hancock County Sheriff's Department and filed a police complaint against Mr. Wilcox for the assault that occurred the previous day. See Exhibit A.

Prior to this incident on April 21, 2016, claimant had received a written warning for an incident that occurred on February 18, 2016; where he used profanity in front of a customer. See Exhibit One. However, this warning was very general in its directives on how claimant was to act at work. No mention of profanity was listed in the written warning even though the incident that led to this warning was claimant's use of profanity. In fact, claimant made comments on the back of this written warning regarding his disagreement and that statement was not submitted with Exhibit One but was read into the record. Further, there were never any written warnings given to claimant about his theft of gas, improper use of a company vehicle, or any damage caused to a forklift or bag machine.

Mr. Wilcox testified that he did not remember specifically what the claimant said to him on April 21, 2016 but that he used every profane word available and that the profanity was directed towards him. Claimant denied this. When Mr. Wilcox was asked to describe what the claimant was doing to act belligerent or insubordinate he was not able to give any specific examples or details regarding that day.

Approximately six to eight weeks prior to the incident on April 21, 2016, there was a previous occasion where Mr. Richter had to ask Mr. Wilcox to leave claimant alone so they could get their work completed. Mr. Wilcox was yelling and threatening claimant at this time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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 and (4) 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.
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> 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).
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> (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.

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). 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).

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*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's testimony more credible than Mr. Wilcox's testimony. Claimant's testimony was very specific and Mr. Wilcox could not remember what claimant actually said that was insubordinate or belligerent except the use of every profane word, which is not credible. When asked several times to explain specifically what actions claimant did on April 21, 2016 that led him to believe claimant was insubordinate he could not remember. Claimant's recollection of the incident that occurred on April 21, 2016 is more credible. When Mr. Wilcox became upset that claimant was not performing well in his job by stopping the hand crank on time to stop beans from flowing into the tote he became irate. He approached and threatened the claimant physically and verbally. When claimant responded asking if Mr. Wilcox was threatening him again, he discharged claimant.

Employer contends that claimant was discharged due to tardiness; however, Mr. Richter was the supervisor who set claimant's schedule. Claimant credibly testified that so long as he was not more than ten minutes late to the job Mr. Richter had told him that was fine. The dates Mr. Wilcox testified that claimant was tardy involved him being late by 6 minutes, 3 minutes, 1 minute, 4 minutes, and 3 minutes. All of these times were within the ten-minute guideline that had been given to him by his supervisor. In fact, on April 21, 2016 claimant was 12 minutes early to the worksite. There is no final incident of tardiness that occurred on April 21, 2016.

Mr. Davis testified that claimant was a safety concern because he had damaged the fork lift and damaged equipment when he improperly used it. These incidents occurred in January 2015 and sometime prior to that date. However, there are no written warnings issued to claimant regarding these incidents and claimant was allowed to continue working for an additional year and three months after these incidents occurred. These are not current acts of misconduct.

Mr. Wilcox also testified that claimant's use of profanity was a reason for the discharge. However, both Mr. Davis and Mr. Richter confirmed in their testimony that other co-workers use profanity and they do so themselves on occasion. Further, Mr. Wilcox testified that claimant used profanity every day. However, Mr. Davis testified that claimant used profanity two to three times per week. Given these inconsistencies the administrative law judge does not believe that claimant was discharged for use of profanity or used profanity during the April 21, 2016 incident.

There must be a current act of misconduct to disqualify the claimant from receiving benefits. In this case, there was none. Claimant credibly testified that he was discharged because he offered a solution in having other employees check the weight on bags after they were filled and Mr. Wilcox did not like that. Mr. Wilcox was upset with claimant's job performance; however, there was no evidence presented that claimant was intentionally performing below his ability to

do so. In fact, quite the opposite, as Mr. Wilcox testified that he had continuously yelled at claimant for failing to get the weights right on the bags for over a year. Mr. Wilcox then threatened claimant verbally and physically. There was no current act of misconduct committed by claimant.

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.

The employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, specific and not generalized notice should be given.

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, employer incurs potential liability for unemployment insurance benefits related to that separation.

Without a current act, the employer failed to meet its burden of proof of establishing disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The May 10, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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