IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BART W LITTLE
14882 – 150TH ST
WHAT CHEER IA 50268

AXMEAR FABRICATING SERVICES INC
AXMEAR FABRICATING SERVICES
16224 HWY 22
KESWICK IA 50136

Appeal Number: 05A-UI-06131-H2T
OC: 05-15-05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 3, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on June 29, 2005. The claimant did participate. The employer did participate through Jeff Fairchild, Supervisor.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a weld shop lead full time beginning December 30, 2002 through May 18, 2005 when he was discharged.

The claimant primarily built machines that were used to cut tires and were sold by Lou Smith of DESCO Corporation. Mr. Smith and Mr. Axmear, the owner of Axmear Fabricating, have a long, tumultuous and contentious history of not being able to get along. Axmear Fabricating builds the machines that are eventually sold by Mr. Smith at DESCO Corporation. When Mr. Smith learned that the claimant was considering leaving Axmear Fabricating he told the claimant that he would pay him an extra $250.00 for every machine he built so long as he, the claimant, stayed employed at Axmear. This situation had been going on for approximately one month when Mr. Axmear and Jeff Fairchild found out about it. Mr. Axmear never said anything to the claimant about the arrangement. When Mr. Fairchild asked the claimant if it were true, the claimant told him yes. The claimant was never disciplined or forbidden to engage in the arrangement he had with Mr. Smith. In fact, the claimant believed that Mr. Axmear was happy about the arrangement, as he would have done something similar himself. Mr. Smith paid the claimant a total of $2,000.00 dollars. Mr. Axmear knew and approved of the pay arrangement between the claimant and Mr. Smith at least one week prior to the May 17, 2005 argument.

On May 17, Mr. Axmear received an e-mail from Mr. Smith in which Mr. Smith questioned the quality of some of the machines being built by the company. Mr. Axmear accused the claimant of making derogatory statements to Mr. Smith about the company product. The e-mail message had mentioned by name Mr. Fairchild and the claimant, yet Mr. Axmear accused only the claimant of making the derogatory comment. The claimant vehemently denied ever making any derogatory comments. Mr. Axmear then called the claimant a “backstabbing crooked piece of shit” and instructed Mr. Fairchild to tell him he was fired. Mr. Fairchild told the claimant he was fired and then Mr. Axmear told him to tell the claimant he was not fired because he wanted to talk to him some more. The claimant left the building after being told he was discharged and went to his truck where Mr. Fairchild met him again and told him he was not fired. The claimant told Mr. Fairchild he was fed up with Mr. Axmear berating and verbally abusing him and he got in his truck and left. Mr. Fairchild called the claimant the next morning to ask him if he was going to return to work and the claimant said no he had suffered enough of Mr. Axmear’s abuse. The issue of the claimant taking money from Mr. Smith had nothing to do with his discharge. The claimant was discharged because Mr. Axmear believed he had made derogatory comments about the machines to Mr. Smith.

REASONING 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 Code section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. There is no proof that it was the claimant who made a derogatory remark to Mr. Smith. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. Once the claimant was told he was fired by Mr. Fairchild, he was not obligated to remain on the premises to endure more of Mr. Axmear's verbal abuse. It is unacceptable for employees to use profanity when speaking to the employer, the employer's other workers or customers. "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. EAB, 462 N.W.2d 734 (Iowa App. 1990). Similarly, employees are not required to put up with profanity from the employer.

As no misconduct has been established, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The June 3, 2005, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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