IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MIRANDA D VOS Claimant **GRINNELL MUTUAL REINSURANCE CO** Employer	**APPEAL 17A-UI-09988-NM** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/03/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 29, 2017, (reference 01) unemployment insurance decision that denied benefits based on her discharge for violation of a known company rule. The parties were properly notified of the hearing. Pursuant to Iowa Administrative Code rule 871—26.6(6), the administrative law judge consolidated this appeal for hearing along with appeal numbers 17A-UI-09986-NM, 17A-UI-10012-NM, and 17A-UI-10014-NM and held one consolidated hearing, in-person in Des Moines, Iowa, at 9:00 a.m. on November 16, 2017. All parties agreed to the consolidation, and no substantial rights of any party were prejudiced. The claimants, Sarah Pfennigs, Miranda Vos, and Paul Gilbert participated and were represented by attorney Mark Sherinian. Also testifying on behalf of the claimants were Nat and Marci Clark, Danell Steward, and Etheridge Netz. The employer participated through attorney Brian Fagan, General Counsel Paul Lahn, and witnesses, Karen Richards, Jeff Vogts, and Jennifer Miller. Employer's Exhibit 1 through 5 and claimants' Exhibits A through K were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a content creator from September 23, 2014, until this employment ended on September 6, 2017, when she was discharged.

On September 1, 2017, as part of an unrelated investigation, it was brought to the employer's attention that there were some issues in the marketing department. An investigation began, which included a search of electronic communication (email and messenger chats) between employees in the department. The investigation found a large number of emails exchanged between the claimants which contained an excessive amount of profanity, primarily directed at another member of the marketing department. (Exhibit 2). Some of the most profane and graphic emails came from Gilbert. (Exhibit 2, Pages 1 through 3). Gilbert was a member of the

management team, though he did not directly supervise either of the other two claimants or the subject of the emails. This sort of conduct was in violation of several policies, including the Code of Conduct and Information Security Policy. The Information Security Policy makes clear that all electronic communication sent on the employer's server are property of the employer, should not be considered private, and should not be used to create or distribute disruptive or offensive messages. (Exhibit 1, Pages 5 through 8). The Code of Conduct dictates employees should be "caring, courteous, dignified, and pleasant" while in the workplace. (Exhibit 1, Page 11). The claimants generally denied they were aware of these policies, though they admitted to receiving an employee handbook upon hire. Meetings were held with each of the claimants on September 6, 2017, in which they were notified of the decisions to terminate their employment, purportedly for violating the above mentioned policies.

The claimants contend the reasons for termination cited by the employer were actually pretext and that the real reason they were being terminated was for engaging in protected activity under the Iowa Civil Rights Act. Claimants presented consistent and undisputed evidence and testimony that profanity was very common in their workplace, even among supervisors and members of the management team. (Exhibits A, B, and E). The employer contends that claimants' conduct can be distinguished from that of other employees due to its particular vulgarity and maliciousness towards one individual. Claimants testified they were unaware this conduct would lead to their discharge and none of them had any prior warnings or disciplinary action for similar conduct.

Claimants further testified their behavior was the result of months of frustration with the target of their communication. Specifically, Pfennings and Vos, along with two other members of the marketing department who are not parties to the case, had significant personality conflicts with their coworker, that appear to have been born out of their coworker's tendency to overstep his role and attempt to dictate their work. Along these same lines, Pfennings and Vos suspected, and Gilbert was attempting to confirm, that this coworker was manipulating data in order to make himself appear in a more favorable light than other members of the marketing department. Pfennings, Vos, and the other two members of the marketing department had brought their concerns to their supervisor, Miller, via a written letter, but felt like no action was being taken. (Exhibit 3). Additionally, Vos testified she had brought her concerns regarding her coworker attempting to dictate her work to several other members of management, including Vogts. Pfennings and Vos testified they believed the letter they submitted to Miller made clear they believed their coworker was treating them this way based on their sex, though the letter never mentions this and the other two members of the marketing department who authored the letter were male.

While Gilbert was not a party to the letter submitted to Miller, he contends he engaged in his own protected activity in late July or early August 2017, when he recommended one of his subordinates be terminated. Gilbert testified his recommendation was the result of a combination of issues with the employee's performance and an incident in which the employee had been disruptive to the workday of at least two employees by excessively texting them because he was upset about his romantic relationship with one of the employees ending. The subject employee was not discharged at that time, despite Gilbert's recommendation, but was given a final written warning and discharged at a later date for an unrelated incident. Gilbert testified he considered his subordinate employee's disruptive conduct to be sexual harassment and his recommendation of discharge to be protected activity.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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 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).

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. A determination as to

whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "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. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983). While there is no citation for discriminatory content, but there is no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment and other factors as well.

The claimants were discharged after it was discovered they had used the employer's electronic communication to exchange a series of profane, inappropriate, and malicious messages about a coworker with whom they were frustrated. The claimants contend the proffered reason for their discharge is a mere excuse and that the real reason they were discharged was because they engaged in protected activity under the Iowa Civil Rights Act. Claimants' argument on this ground is unconvincing. However, the claimants have shown that this sort of behavior was so common in this workplace that they would have no reasonable way of knowing, without prior warning, that it could lead to their discharge from employment.

The claimants' conduct was most certainly inappropriate and unacceptable in the workplace, especially for Gilbert, who was a member of management. While the employer was well within its rights to discharge the claimants for this behavior, 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, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

While claimants' conduct can be distinguished from other employees due to its frequency, directedness at one individual, and extreme vulgarity, it had nevertheless been established that language which may be considered inappropriate in the average work place was common in this

workplace. The inappropriate language was limited to electronic communication that the claimants, erroneously, believed was private and were never shared with the individual it was directed towards, who was not in a supervisory authority over them. Because profane language was so common in the workplace, there was no reasonable way for the claimants to know what degree, frequency, or manner of profanity was acceptable versus unacceptable. Taking into consideration all of the above listed factors and considering, the employer had not previously warned claimants about the issue leading to the separation, it has not met the burden of proof to establish they acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The September 29, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/rvs