

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANEL BAJREKTAREVIC
Claimant

MENARD INC
Employer

APPEAL 17A-UI-00205-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/11/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Anel Bajrektarevic (claimant) filed an appeal from the January 3, 2017, (reference 01) unemployment insurance decision that denied benefits based upon the determination Menard Inc. (employer) discharged him for insubordination in connection with his job. The parties were properly notified about the hearing. A hearing was held in Des Moines, Iowa on January 25, 2016, at 9:00 a.m. The claimant participated personally. The employer participated through Assistant General Manager Edwin Vicich and was represented by Attorney Paul Hammell. Employer's Exhibit 1 was received over the claimant's objection.

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: The claimant was hired as a part-time Yard Shipping/Receiving Team Member on March 25, 2016. He was promoted to a full-time position in the same job title on May 15, 2016. The claimant's employment ended on December 13, 2016 when he was discharged. The employer has general regulations outlined in its employee handbook. General Regulation 6 prohibits threats, intimidation, harassment or the use of profanities, among other things, towards guests and other Team Members.

The employer has a third-party vendor that provides security to its stores. On December 10, 2016, Security Guard James directed a guest to return an item at the claimant's register. The claimant did not believe the guest should have been sent to him as the item being returned did not belong in his area. The claimant walked over the guard shack to tell James about the incident and express his frustration with James' actions. Both parties became upset but no profanity was used. At one point, the claimant pointed at James' face while making a comment to him. The argument did not become physical and both parties walked away from each other. Neither party told management about the exchange.

On December 12, 2016, Security Guard John was walking near the claimant's area. The claimant told John to "tell James to 'watch his back and that he has it coming.'" (Employer's Exhibit 1.) John finished his patrol of the claimant's area and reported to his supervisor Dale what had been said. Dale contacted the employer's management team who conducted an investigation. The employer determined the claimant had violated General Regulation 6 and discharged him for his violation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits based upon wages credited from this employer's account are denied.

Iowa 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 regulations define misconduct:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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). 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).

The employer presented a statement from John regarding the incident that occurred on December 12, 2016 stating the claimant threatened James. The claimant denies threatening James, but instead told John to tell James to "fuck off." (Claimant's Testimony.) 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 John's version of events to be more credible. John did not know about the events that transpired on December 10, 2016 between James and the claimant. John also has no interest in the outcome of the hearing.

The employer has presented substantial and credible evidence that the claimant made threatening comments about an employee of one of its third party vendors. The employer has a duty to protect the safety of its employees and employees working on its property. The claimant's threat of harm was contrary to the best interests of the employer and the safety of his coworker. The threat is misconduct even without prior warning. Accordingly, benefits based upon wages credited from this employer's account are denied.

In the alternative, even if the claimant's version of what occurred during his discussion with John was found to be credible, the claimant would still be denied benefits. The claimant testified he told John to tell James to "fuck off." "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. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). It was one incident of profanity which still violated General Regulation 6 and would be disqualifying even without prior warning.

DECISION:

The January 3, 2017 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits based upon wages credited from this employer's account are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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