IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ISABEL M CRUZ Claimant **CATHOLIC HEALTH INITIATIVES - IOWA** Employer	**APPEAL NO. 20R-UI-00397-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/06/19** **Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated November 7, 2019, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on February 3, 2020. Claimant participated personally and with attorneys Beatriz Mate-Kodjo and Leonard Bates. Employer participated by hearing representative Thomas Kuiper and witnesses Chris McGuire, Ilona Fournier, and Doreen Richmond. Claimant's Exhibit A and Employer's Exhibits 2, 3, and 4 were admitted into evidence. Interpretive services were provided by CTS Language Link.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on September 30, 2019. Employer discharged claimant on September 30, 2019 because claimant was alleged to have used foul language in Spanish in front of coworkers, guests and patients.

Claimant worked in the food service department for employer. Claimant was upset that the coworkers on her floor would work with others and offer no assistance to claimant. This would make their work easier and claimant's work more difficult. Claimant was upset about this and went to speak with a supervisor on September 19, 2019. She used foul language to complain about her coworkers. Claimant spoke in English. (Employer stated that claimant's use of foul language in the office of her supervisor was not a terminable event).

Claimant then went to another supervisor to complain of the supposed unfair treatment received as others had a much easier time at work than she did. When she spoke with this supervisor, she did not use foul language. Claimant spoke in English.

At some time in this same period, claimant went to the cafeteria. She spoke out loud in Spanish expressing her complaints. Two coworkers alleged that claimant was loudly cussing in Spanish. Neither of the two coworkers testified at the hearing. One of the coworkers alleged that a guest

stated they understood what claimant was saying at that it was not appropriate. Claimant stated that she did not say any foul language, but admitted to using language in Spanish that has both a foul interpretation and a non-foul interpretation.

Employer stated that claimant was terminated for using this language in public around patients, coworkers and guests. She would have received a warning for her use of foul language to the first supervisor she spoke with, but would not have been terminated.

Claimant argued that she'd just been granted intermittent FMLA leave. Claimant argued that employer did not want claimant to have this leave, and chose to rid themselves of claimant rather than have to deal with claimant's intermittent leave, which was to extend for the next five months. Claimant offered nothing concrete to support this theory, but did offer that claimant's initial FMLA request was rejected, and on the Termination Notice it listed claimant as having been denied leave when she was in fact granted leave. The denial was listed, for no reason, under the section for previous corrective actions.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 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).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers, 462 N.W.2d at 737*. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997)*. "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991)*. In this matter, it was incumbent upon employer to prove that claimant uttered the words she was alleged to have uttered in the cafeteria. Not only did employer have to prove the uttered words, but as they were uttered in Spanish and the words allegedly offered had multiple meanings, employer had to prove the context in which claimant uttered the words lead to the sole interpretation that claimant was speaking foul language in public. Towards that end, employer could have offered the Spanish speaking coworkers of claimant who were alleged to have heard the statements made by claimant. Only through their actual testimony could context have been brought that would have potentially countered claimant's argument. Employer chose to have neither of the two witnesses testify. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Here, employer could have easily produced the only two direct witnesses for the hearing, but did not.

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id. In this matter, the administrative law judge found the testimony of Ilona Fournier to be highly credible. This established claimant uttering foul words in a private office and claimant being very upset. Chris McGuire also gave testimony that is deemed consistent and credible. Testimony from the claimant and from Doreen Richmond appeared to be biased and self-serving. The claimant's testimony was biased for the obvious reason that she wanted to defend her actions. But claimant could not reasonably explain why Ms. Fournier would give false testimony regarding cussing in her office. Ms. McGuire could not explain why she put the incorrect and irrelevant statement that claimant had been denied FMLA benefits in the write up she created.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning using foul language in a public environment. Claimant was not terminated for her statements in a private office, but rather for her statements made in the cafeteria, which were unproven.

The last incident, which brought about the discharge, fails to constitute misconduct because employer did not prove that claimant made the statements she was alleged to have made, and didn't provide context to any words allegedly stated that would show whether they were stated in a foul way or not. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated November 7, 2019, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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