IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CLIFFORD G FREEMAN Claimant **CASEY'S MARKETING COMPANY** Employer	**APPEAL 21A-UI-15872-DH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/18/21** **Claimant: Appellant (4)**

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.4(3) - Able to, Available for, Work Search

STATEMENT OF THE CASE:

The Claimant filed an appeal from the July 15, 2021, (reference 01) unemployment insurance decision that denied benefits based upon records indicating claimant voluntarily quit work on February 9, 2021 due to being dissatisfied with work conditions. The parties were properly notified of the hearing. A telephone hearing was held on August 25, 2021. The claimant personally participated. The employer participated through Courtney Moren, Claimant's immediate supervisor.

ISSUES:

Was claimant's discharge from employment a disqualifying event prohibiting him from benefits? Was claimant able to work, available to work and earnestly and actively seeking work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a store employee from November 30, 2020, until this employment ended on February 1, 2021, when he was terminated for violation of the employer's no call/no show policy and the business conduct/ethics policy for conduct on January 31, 2021. Employer has an employee handbook. In that handbook, there is a policy regarding the following: no call/no show and business conduct/ethics. Employer did not know how the policies read, but knew they dealt with being to work on time and calling in if you were going to be late or not coming to work and to conduct yourself professionally and not to use profanity. Both parties agree there is a hard copy of the employee handbook in the office at work. Employer states all employees are provided a link to an electronic copy, which Claimant denies receiving. Claimant advises there is a tablet at work that has an electronic copy of the employee handbook. Claimant states that while at work, employees are expected to work and not look at the handbook.

Claimant was scheduled to work a shift on January 31, 2021. Claimant was running behind and was already late when called and talked to co-workers. The co-workers advised claimant they had someone to cover his shift and he should talk to Ms. Moren. Claimant called Ms. Moren to advise that he was on his way to his shift. Ms. Moren advised that he did not need to come in as

he is already late and his shift is being covered. During the phone call between claimant and Ms. Moren, claimant used profanity stating “I’m trying to fucking work with you.” Claimant does not recall saying this but says he may have done so, but only in his frustration. Claimant told Ms. Moren in the telephone call that “You can afford it, you’re white” in regards to having time off work without pay. Claimant admits to making this statement. Ms. Moren decided to terminate claimant and did so when claimant came to work on February 1, 2021. See ER Exhibit 1. Claimant was not aware that his job was in jeopardy or that he could be terminated if these policy issues were not satisfactorily resolved. Employer agreed that claimant was unaware his job was in jeopardy.

Claimant had 2 or 3 other no call/no show incidents but the employer only addressed one of those incidents with claimant. This was done informally, by orally reminding claimant he needed to call in if he’s having a problem getting to work on time. No “Corrective Action Statement” was filled out on any of the prior incidents. Claimant remembers having a couple prior no call/no show incidents. Claimant remembers being orally reminded of the need to call after one of these incidents.

Claimant testified that his difficulties in getting to work timely revolved around his grandmother’s health and then placement in hospice. His grandmother passed away on February 3 or 4, 2021. Claimant testified that due to his grandmother’s death, making funeral arrangements and the funeral, he could not have worked from February 2 - February 12, 2021.

The administrative file shows claimant was also not able/available to work the week ending March 20, 2021.

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.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here. Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible.

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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it 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.

"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). Vulgar language in front of customers can constitute misconduct, Zeches v. Iowa Dep't of Job Serv., 333 N.W.2d 735, 736 (Iowa Ct. App. 1983), as well as vulgarities accompanied with a refusal to obey supervisors. Warrell v. Iowa Dep't of Job Serv., 356 N.W.2d 587, 589 (Iowa Ct. App.1984). Claimant used profanity and offensive language over the telephone with their supervisor and not in front of customers. While inappropriate, it was not done in a confrontational manner; was not disrespectful; was not name calling; and was not refusing any supervisor's directive. Given the nature of the exchange, a prior warning about any use of profanity/offensive language would gave claimant notice that the use of such language is not tolerated under any circumstance. Therefore, the act was not a disqualifying work-related misconduct.

Iowa Admin. Code r. 871-24.23(16) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

Claimant testified that if work was available for him from February 2-12, 2021, that he would not have been able to accept that work, given the death of his grandmother, making funeral arrangements and the funeral. This is for the weeks ending February 6, 2021 and February 13, 2021.

The administrative record shows claimant reported he was not able/available for the week ending March 20, 2021. Claimant did not recall the circumstances surrounding this.

DECISION:

The July 15, 2021, (reference 01) unemployment insurance decision is modified in favor of appellant.

Claimant was discharged from employment for no disqualifying reason. However, regarding able and available to work, claimant was not able to work and available to work for the three weeks ending February 6, 2021, February 13, 2021 and March 20, 2021. Benefits are allowed, with the exception for the three weeks claimant was not able/available to work, provided he is otherwise eligible.

Darrin T. Hamilton
Administrative Law Judge

September 2, 2021
Decision Dated and Mailed

dh/scn