

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMANDA R PEPPERS
Claimant

APPEAL 17A-UI-00288-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AUTOZONERS LLC
Employer

**OC: 12/11/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Autozoners, LLC (employer) filed an appeal from the December 28, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient information to show it discharged Amanda R. Peppers (claimant) for misconduct. The parties were properly notified about the hearing. A telephone hearing was held on January 31, 2017. The claimant participated personally. The employer participated through District Manager Michael Day. Employer's registered witness Regional HR Manager Louise Rinke was called numerous times for the hearing, but was not available at the number registered and did not return the voice message left by the administrative law judge. No request to postpone the hearing due to her absence was made. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, specifically the fact-finding documents for purposes.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits?
Can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Commercial Sales Manager beginning on June 10, 2011, and was separated from employment on December 9, 2016, when she was discharged. The employer has a policy that prohibits racist remarks or jokes in the workplace.

During her employment, the claimant and an Assistant Manager made comments to an employee that he was going to be sent back to Puerto Rico on a 747 airplane when he would make mistakes. The employee made similar comments in return so the claimant did not think

those comments bothered him. After the Assistant Manager left employment, the claimant continued to make these comments.

The claimant also used the words “Nigga” or “Nigger” while at work. (Employer’s Exhibit 1.) She would use the term in reference to customers while speaking to other employees or when muttering to herself if she felt the customers were being rude or ignorant. She used it regardless of the customer’s race. She also used it when talking to herself if she could not find something or believed she had done something stupid. She had most recently used the racial epithet the week of November 13, 2016 when speaking with her supervisor, Store Manager Jimmy Edlemon. Edlemon admonished her at that time that she could lose her job for using that kind of language. The claimant did not use the term at work after that day.

On November 30, 2016, Regional HR Manager Louise Rinke began an investigation into the claimant’s conduct based on employee complaints. The employer does not have recorded the dates the complaints were made or the dates of the alleged incidents. Rinke met with two employees and the claimant that day. Based on her investigation, she concluded the claimant had violated the employer’s policy. The claimant was discharged on December 9, 2016 due to her conduct.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,363, since filing a claim with an effective date of December 11, 2016, for the seven weeks ending January 28, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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).

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. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The final incident must not only rise to the level of misconduct to be disqualifying, but it must also be a current act. Iowa Admin. Code r.871-24.32(8). A lapse of 11 days from the final act until discharge when the employee was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

While the claimant's conduct disregarded the standards of behavior that the employer has the right to expect of employees, especially employees in management positions, her last act of misconduct occurred the week of November 13, 2016 and she was not discharged until December 9, 2016, almost a month later. The claimant also received a verbal warning for her conduct from her supervisor after the statement she made the week of November 13, 2016. The employer has not established the claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment and repayment are moot and the charges to the employer's account cannot be waived.

DECISION:

The December 28, 2016 (reference 01) unemployment insurance decision is affirmed. The employer has not established a current or final act of misconduct. Benefits are allowed, provided the claimant is otherwise eligible. The issues of overpayment and repayment are moot and the charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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