

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BRITTANI JOHNSON
Claimant

APPEAL 16A-UI-06496-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HUCKLEBERRY ENTERTAINMENT LLC
Employer

OC: 05/01/16
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 23, 2016, (reference 02) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 29, 2016. The claimant participated personally. The employer participated through Steve Morley, director of human resources. Michael Holland, manager, testified for the employer. Department exhibits D-1 and D-2 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?

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: A disqualification decision was mailed to the claimant's last-known address of record on May 23, 2016 (Department exhibit D-2). The employer is located also in Burlington, Iowa and received its copy May 26, 2016. However, the claimant received the decision June 8, 2016, after the due date. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 2, 2016. The appeal was not filed until June 9, 2016, (Department exhibit D-1) one day after receipt of the decision, and after the due date noticed on the disqualification decision.

The employer's business is called Fun City and its primary customers are children and family. The claimant was employed full-time as a cook/cashier and was separated from employment on May 5, 2016, when she was discharged for profanity in the workplace. At the time of hire, the claimant was trained and issued a handbook, containing employer policies. The employer

prohibits profanity around customers and also has a policy which allows employees to report any concerns or harassment to management or human resources. The claimant acknowledged receipt of the handbook and previously had spoken with human resources director, Steve Morley, on numerous issues.

Prior to discharge, the claimant had been demoted from her position as supervisor, after an argument with a co-worker named Selena. The claimant used to be best friends with Selena, who was in the role of lead shift supervisor at the time of the claimant's separation. The claimant did not report any concerns to the employer about Selena, including allegations of illegal activity, until after she (the claimant) was discharged. On May 4, 2016, the claimant was presented two written notices being circulated to employees, requesting a signature. The notices were regarding completion of assigned tasks, including a reminder for employees to wrap and date food product. The claimant told another employee that she wasn't going to the sign the notices because Selena wasn't her manager, and Scott Briggs was her manager. Then the claimant observed Selena, "talking crap" about her to employees, indicating she had previously been a good employee and was now hormonal, because the claimant was pregnant.

The claimant began cussing at Selena, and used the "f" and "b" words. The employer reported the claimant's outburst was so loud and disruptive that employees in other departments could hear, as well as any children and parents on site. Selena reported the incident to Mr. Holland, the manager on duty, who with security, confronted the claimant, and asked her to clock out. The claimant denied the employer was busy that day or that she continued cussing in the presence of Mr. Holland, who alleged she continued to use profanity upon being escorted out. She was subsequently discharged. After discharge, she reported to Mr. Holland that she believed Selena was engaging in illegal activity on the premises. The claimant did not report sooner because "she's not that kind of person".

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is timely and the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall

be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received in a timely fashion because she did not receive the decision within the period to appeal. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant filed the appeal within one day of receipt. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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.

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).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the claimant worked in a children/family oriented environment, and was aware of the employer's expectations with regard to appropriate language and prohibition of profanity in the workplace. The claimant had previously engaged in a confrontation with the shift supervisor, Selena, which triggered her being demoted from supervisor. On the claimant's final day of employment, she was observed yelling and cussing at the shift supervisor, Selena, in response to a request to sign off receipt of a reading a list of reminders about food wrapping and preparations. Even if the claimant did not continue to use profanity to Mr. Holland, "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). The claimant knew or should have known her conduct was in violation of the reasonable standards an employer has the right to expect of its employees. The claimant's reporting of suspected illegal conduct of Selena is not relevant to the case at hand inasmuch as the claimant knew of the same information prior to May 4, 2016, but did not report them until after she was discharged. Based on the evidence presented, the administrative law judge concludes that the claimant's cursing at a shift supervisor, (even if it was not her immediate supervisor) is disqualifying misconduct, even without prior warning. Benefits are denied.

DECISION:

The May 23, 2016, (reference 02) unemployment insurance decision is affirmed. The appeal in this case was timely. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs