

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIAN C VANVEEN
Claimant

ADVANCE SERVICES INC
Employer

APPEAL 19A-UI-02146-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/10/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 7, 2019, (reference 03) representative decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 27, 2019. Claimant participated along with his witness Angie Gomez. Employer participated through Melissa Lewien, Risk Manager. Employer's Exhibit 1 was admitted into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct sufficient to disqualify him from receipt of unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was last to work at Pioneer beginning on October 27, 2017 through February 11, 2019, when he was discharged both from his assignment and from any further work for the employer.

On February 10, the claimant and several coworkers were working in the break room getting ready to mop the floor. One of claimant's coworkers asked him to put the chairs up on the tables. The claimant responded by saying something along the lines of "I ain't no f***in n***er." (Employer's Exhibit 1) The claimant's use of the "n-word" was heard by three coworkers one of whom reported it to Alex DeJong. Mr. DeJong spoke to the claimant that same day. Initially the claimant denied making the comment, but eventually admitted to Mr. DeJong what he had said.

Ms. Lewien learned of the incident on February 11. She had Mr. DeJong collect written statements from the witnesses. Those statements are found at Employer's Exhibit 1. Each of the claimant's three coworkers indicated that the claimant had said the "n-word" at least once. The claimant had been given a copy of the employer's policies and rules. That handbook makes clear that the employer may discharge any employee for even one violation of the employer's code of conduct. Using the "n-word" in the workplace is a violation of the employer's code of conduct.

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.

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).

"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. EAB*, 462 N.W.2d 734 (Iowa App. 1990).

An employer is not required to list in their work rules all words that if used in the workplace would be grounds for immediate termination. The employer's policy is clear that use of offensive language can lead to discharge. It is well known that use of the "n-word" is offensive and inappropriate in the workplace.

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.

The employer has provided the more credible evidence. Three of claimant's coworkers all heard him use the offensive language. The claimant knew, or should have known that such conduct was unacceptable. Claimant's conduct is detrimental to the employer as they will lose customers/clients if employees use such offensive language. The employer has met their burden of proof. The claimant was discharged for substantial job connected misconduct. Benefits are denied.

DECISION:

The March 7, 2019, (reference 03), decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits 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.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs