

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

RICHARD D COLON
Claimant

APPEAL NO: 10A-UI-14592-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACT INC
Employer

OC: 08/15/10

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

ACT, Inc. (employer) appealed a representative's October 13, 2010 decision (reference 01) that concluded Richard D. Colon (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 7, 2010. The claimant participated in the hearing. Tom Kuiper of TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses, Deb Schrieber, Cheryl Nuno, and Tony Hubbard. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 10, 2006. He worked full time as an associate analyst in the information technology division at the employer's Iowa City, Iowa location. His last day of work was August 7, 2010. He was allowed to go on vacation at that time pending review of disciplinary issue. The employer discharged him on August 16, 2010. The stated reason for the discharge was making improper comments regarding a lead worker on July 31, 2010.

The claimant worked an overnight shift from 12:00 a.m. to 7:30 a.m. On the morning of July 30 at about 7:00 a.m., as the claimant's shift was nearing its end, he approached a coworker, Mr. Hubbard, who had arrived to work the daytime shift. The claimant was upset about some negative comments on a review he had been given the prior day, and believed that a female lead worker/acting supervisor was responsible. He stated to Mr. Hubbard, referring to this lead worker, that "your c - - - of a friend over there f - - - ed me over on my review." He proceeded to indicate that the comments were "b - - - s - - -" and that he had been "screwed." He went on for about 15 minutes, and was very loud and agitated. While the lead worker referred to was not in

the area, at least on other coworker in the vicinity did overhear at least portions of the conversation. The claimant then went on his way. The claimant's comments and conduct were referred to the employer.

On July 31 the claimant was advised that an investigation into the incident was underway. On August 5 he was informed that a decision had not yet been made, but that he would be permitted to take vacation time beginning August 8 until a decision was made. On August 16 the employer informed the claimant that he was being discharged due to the incident.

The claimant established a claim for unemployment insurance benefits effective August 15, 2010. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

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. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

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. Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990). Further, misconduct can be found even if the isolated incident is a situation in which the target of the abusive name-calling was not present when the vulgar statements were made. Myers, supra. The claimant's vulgar references to his lead worker shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not

received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's October 13, 2010 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 15, 2010. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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