

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KRISTY M LAVELLE
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL 22A-UI-00979-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/29/21
Claimant: Appellant (1)

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

Claimant, Kristy Lavelle, appealed the December 9, 2021, (reference 02) unemployment insurance decision that denied benefits based upon an August 31, 2021, discharge for violation of workplace rules. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for February 1, 2021. Claimant, and her spouse, James Lavelle, participated in the hearing. The Employer, West Liberty Foods, LLC, participated through Monica Dyar, human resources supervisor. Employer's Exhibit A, Standards of Conduct, was admitted. Judicial notice was taken of the administrative file and its contents.

ISSUE:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed all of the evidence in the record, the undersigned finds:

Claimant was a full-time employee with the title of health specialist, starting October 19, 2020, with her last day worked being August 27, 2021. Claimant was suspended from work pending an investigation on August 30, 2021, regarding performance, lack of professionalism, and frequent breaks. Claimant was discharged from work on August 31, 2021, for lack of professionalism, language (profanity), failing to follow protocols and excessive breaks in violation of a known company rule.

Employer has an employee handbook, which claimant received a copy on October 9, 2020. Employer Exhibit page 1. Among the rules, are rules governing interference with other coworkers, use of foul or indecent language while on employer property, violation of usual and customary safety practices, and loitering or wasting time while on the clock. Employer Exhibit page 2.

Claimant receives a 30-minute unpaid lunch and 20 minutes worth of paid break within a workday. An investigation revealed that claimant was abusing this by taking breaks as follows:

SUN	MON	TUES	WED	THURS	FRI	SAT
AUGUST 2021						
15	16 1hr 48m	17 1hr 50m	18 2h 42m	19 2hr 22m	20 1hr 54m	21 2hr 55m
22	23 2hr 13m	24 1hr 50m (Wal-Mart water run)	25 1hr 24m	26 2HR 26M	27 Profanity incident	28
29	30 suspended	31 discharged				

The employer factored in claimant going to Wal-Mart on August 24, 2021, to purchase water for work. The time was calculated in this period by viewing video footage. For the above ten days, break time totaled 21 hours and 24 minutes, which is 13 hours and 4 minutes greater than what she is authorized (50 minutes daily).

On August 27, 2021, claimant was supposed to drive some team members to Hy-Vee so they could get their COVID-19 vaccination. The team members decided they were going to ride together. Claimant did not have to give them a ride. Claimant was near the cafeteria, and the human resources office, clocking into work and was told she did not have to take the team members to Hy-Vee. Claimant stated in a loud voice, "Thank fucking God!" It was in a voice loud enough that others heard this, including the person that told her she didn't need to drive team members to Hy-Vee, and at least one of the team members that she was no longer going to give a ride. When confronted regarding this profanity, she replied that the team members did not know what she said, referring to the fact that they are Spanish speaking and presuming they knew no English, so it would be fine to be profane around them.

June 14, 2021, claimant was on the telephone complaining about her merit pay increase, the company, her job, her shift and how she was not going to do anything extra. Throughout this phone conversation claimant utilized the word "fuck" repeatedly, excessively, and loud enough that at least one person heard it and reported to the employer. June 22, 2021, the safety manager spoke with claimant regarding this behavior, that profanity is inappropriate and unprofessional. Claimant replied that others say worse on the factory floor. Claimant was advised that she is not a factory floor worker and, in her position, a higher level of professional conduct is expected, that no one has a contract, making everyone an employee at will and if she had suggestions to improve employee morale, she should share them. Claimant advised that nothing would change.

August 27, 2021, claimant called a coworker after their hours to tell the coworker that she does not have to provide information to or otherwise help Chriselda as she is not their boss and works in another department. The coworker acknowledged that claimant pushes backs and obstructs others as opposed to doing the work and getting along. She got worked up to a level that she took an attendance point and went home.

August 13, 2021, claimant, and Ms. Dyar had an exchange regarding recent changes in the COVID-19 policies. Claimant became upset, using language such as the company is "screwing over" employees, her objections to the policy and sharing her opinion the validity of the policies.

August 12, 2021, claimant was conducting COVID-19 testing without utilization of proper PPE per policies. When confronted and asked where her mask was, she pointed in the direction of her office.

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:

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.

Iowa Admin. Code r. 871-24.1 provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

24.1(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing and considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's and her recollection of those events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. 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. An employer has a "right to expect decency and civility from its employees." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990). Profanity or other offensive language in a confrontational, name-calling, or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990), overruling *Budding v. Iowa Dep't of Job Serv.*, 337 N.W.2d 219 (Iowa Ct. App. 1983). "We have recognized that 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). 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...." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983). While there is no citation for discriminatory content, but there is no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.


In the present case, claimant has a fondness to utilize the work "fuck" doing so in excess and before others. Claimant attempts to explain it away by saying either they speak Spanish, presuming they don't understand English and therefore claimant can be as profane as she wants. However, claimant does not know whether they understood her profanity, and someone did as it was reported and documented, and claimant does not deny it's use. Regarding another incident, claimant downplays it with much worse happens on the factory floor. Claimant is not a factory worker on the factory floor. Claimant was a health specialist, addressing health needs, and was previously warned profanity and the need for greater professionalism. Conflicts in the workplace are bound to occur and it is normal that an employee may become upset with a supervisor. It is also understandable that claimant was frustrated with the situation. Claimant's profane conduct is considered disqualifying misconduct.

Employer established excessive breaks were taken and claimant's explanation is not credible in light of where claimant held the alleged meetings for greater confidentiality that on the face would be more exposed to people seeing and/or hearing the exchanges.

The employer has presented substantial and credible evidence that claimant violated workplace rules regarding profanity, professionalism, and break times. This is disqualifying misconduct. Benefits are denied.

DECISION:

The December 9, 2021, (reference 02) unemployment insurance decision is **AFFIRMED**. Claimant was discharged on August 30, 2021, 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.



Darrin T. Hamilton
Administrative Law Judge

March 4, 2022
Decision Dated and Mailed

dh/mh