IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID E FOGLE Claimant **MAGELLAN MIDSTREAM HOLDINGS GP LLC** Employer	**APPEAL 17A-UI-06036-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/07/17** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 9, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 27, 2017. Claimant participated. Stefan Thompson testified on claimant's behalf. Mitch Anderson registered for the hearing on claimant's behalf, but he did not answer when contacted at the number provided. Employer participated through attorney Tim Carney, operations supervisor, Joshua Pellegrin, and manager of operations Cody Annis. Human resources business partner Chris Matousek and manager of operations Troy Bronson attended the hearing on behalf of the employer, but did not testify.

Employer Exhibits 3, 4, 5, 9, 12, 13, 14, 15, 16, and 17 were admitted into evidence with no objection. Employer Exhibit 7 was offered into evidence. Claimant objected to Employer Exhibit 7 because he was not involved in the harassment. Claimant's objection was overruled and Employer Exhibit 7 was admitted into evidence. Employer Exhibit 8 was offered into evidence. Claimant objected to Employer Exhibit 8 because the misconduct was not his fault. Claimant's objection was overruled and Employer Exhibit 8 was admitted into evidence. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUE:

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: Claimant was employed full-time as a terminal operator from June 5, 2005, and was separated from employment on May 5, 2017, when he was discharged.

The employer has a written policy that governs loading railcars, including an inspection check list. Employer Exhibits 16 and 17. Claimant was aware and has been trained on the policy. Some of claimant's job duties were governed by federal regulations. The employer has a written workplace violence risk reduction and response policy and a Code of Business Conduct,

which prohibits violence, including threats of violence. Employer Exhibits 13 and 14. Claimant was aware of the policy and had been retrained on the policy in January 2017. Employer Exhibit 12.

On May 2, 2017, claimant was working his scheduled shift when Mr. Pellegrin discovered that claimant had violated the employer's policy governing loading railcars. Employer Exhibits 15, 16, and 17. Claimant violated the employer's policy by not completing the pre-loading railcar inspection checklist prior to loading the railcars. Employer Exhibits 15, 16, and 17. When Mr. Pellegrin discovered that claimant had not completed the pre-loading railcar inspection checklist, he asked claimant if claimant had completed the pre-loading railcar inspection checklist. Claimant told Mr. Pellegrin no. Claimant told Mr. Pellegrin he was going to complete the pre-loading railcar inspection checklist once he was done. Claimant had already loaded the railcars. Mr. Pellegrin reminded claimant that the pre-loading railcar inspection checklist needed to be completed prior to loading the railcars. Claimant was aware that the pre-loading railcar inspection checklist needed to be completed before loading the railcars. The employer decided to suspend claimant until the investigation was completed.

Later on May 2, 2017, Mr. Pellegrin brought claimant into the office and told him he was suspended until the investigation was over. Employer Exhibit 15. Mr. Pellegrin informed claimant it would be a paid suspension. Employer Exhibit 15. Mr. Pellegrin testified that claimant became very hostile and started yelling expletives. Employer Exhibit 15. Mr. Pellegrin testified that claimant stated "we were f**king stupid and f**king blind". Mr. Pellegrin testified that claimant was yelling loud enough for others to hear. Claimant then stood up and asked for union representation. Mr. Pellegrin told claimant that he did not need union representation because he just needed to go home. Claimant was walking around stating that he was being denied union representation. Mr. Thompson, claimant's union representative, came over to the office after he heard claimant yelling he was being denied union representation. Mr. Thompson testified that when he arrived, claimant was agitated. Mr. Thompson testified that claimant yelled to Mr. Pellegrin "god damn don't change your story now." Mr. Pellegrin testified claimant had his fists clenched and yelled to him "not to change his "f**king story" and not to "f**king lie." Mr. Pellegrin testified that he felt threatened by claimant's actions. Claimant testified he was not yelling. Claimant testified he did not use profanity. Mr. Thompson then got claimant to leave.

Over the next few days the employer discussed claimant's employment and prior warnings. On May 5, 2017, the employer discharged claimant.

On January 6, 2017, claimant was given a level II written warning because of threatening conduct towards a coworker that occurred in November 2016. Employer Exhibit 12. On November 15, 2016, claimant asked a co-worker "about 'taking it outside the fence'". Employer Exhibit 12. The co-worker felt threatened by claimant's actions on November 15, 2016. Employer Exhibit 12. The level II written warning required claimant to review and sign the employer's "Workplace Violence Risk Reduction and Response policy, and the Code of Business Conduct[.]" Employer Exhibit 12. The warning also required claimant to "treat all co-workers with respect, and will not engage in any action that could be construed as a threat, retaliation, or harassment." Employer Exhibit 12. Claimant signed for the warning on January 6, 2017. Employer Exhibit 12. Claimant was warned that his job was in jeopardy. Employer Exhibit 12. On April 25, 2017, the employer discussed with claimant about not following to company safety procedures and federal regulations. The employer told claimant he needed to follow the employer's policies and procedures.

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. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits that were admitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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.

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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rule requiring employees to complete a pre-loading inspection checklist before loading railcars is reasonable. The employer's policies prohibiting workplace violence, including threats of violence is also reasonable. Although the employer may not have warned claimant about following its safety procedures on April 25, 2017, it clearly discussed with him that he needed to follow the employer policies and procedures, which includes a pre-loading inspection checklist. Despite this discussion, on May 2, 2017, claimant failed to complete the pre-loading inspection checklist before loading the railcars.

Claimant's argument that he was not yelling at Mr. Pellegrin or using profanity on May 2, 2017 after he was told he was being suspended is not persuasive. "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). Mr. Pellegrin credibly testified that claimant was yelling at him. Mr. Pellegrin's testimony that claimant was yelling was corroborated by Mr. Thompson's testimony that claimant was yelling. Mr. Pellegrin also credibly testified that claimant told him "we were f**king stupid and f**king blind" before Mr. Thompson arrived. Mr. Thompson testified that after he arrived, claimant yelled to Mr. Pellegrin, "god damn don't change your story now." Finally, Mr. Pellegrin credibly testified that claimant's actions were hostile and he felt threatened by claimant's actions. Mr. Thompson also testified that when he arrived at the office, claimant was agitated. Furthermore, claimant had been previously warned on January 6, 2017, for violating the employer's Workplace Violence Risk Reduction and Response policy. Although claimant did not have any union representation when he received the warning, he clearly signed the warning, was warned his job was in jeopardy, and acknowledged that he "read and [understood] the consequences associated with this Written Warning." Employer Exhibit 12.

The employer has presented substantial and credible evidence that on May 2, 2017, claimant failed to complete the pre-loading railcar inspection checklist before loading railcars, he used offensive language towards Mr. Pellegrin, and he acted in a hostile and threatening manner, after having been warned. The employer has a duty to protect the safety of its employees. Claimant's actions were contrary to the best interests of the employer and the safety of its employees. This is disqualifying misconduct. Benefits are denied.

DECISION:

The June 9, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/scn