

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JERRY D HOCKER
Claimant

BAGCRAFTPAPERCON II LLC
Employer

APPEAL 16A-UI-11246-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/25/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 11, 2016, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 1, 2016. Claimant participated. Employer participated through human resources/safety manager Chuck Griffin, production supervisor Bill loerger, and gannicott operator Shawn Smith. Employer exhibit 1 was admitted into evidence 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 packer from September 19, 2011, and was separated from employment on September 29, 2016, when he was discharged.

The employer has a written code of conduct that requires employees to treat employees with respect. Claimant was aware of the code of conduct.

On September 21, 2016, claimant approached Mr. Smith, put his hand on Mr. Smith's shoulder in a belittling manner, and claimant stated to Mr. Smith, "Your acting like a Nigger." Employer Exhibit 1. Mr. Smith was offended by claimant's actions. Claimant observed Mr. Smith talking to a supervisor and he went and reported the incident to Mr. loerger. Claimant told Mr. loerger that he said to Mr. Smith, "You're running me like a nigger". Employer Exhibit 1. Claimant complained that Mr. Smith ran the machine faster when he was working than he did when other employees were working. Claimant had never complained to Mr. loerger before about Mr. Smith running the machine too fast. Mr. Smith then came into Mr. loerger's office upset.

On September 22, 2016, Mr. Smith and claimant filled out written statements for the employer about what happened on September 21, 2016. Employer Exhibit 1. On September 23, 2016,

the employer placed claimant on paid administrative leave pending the investigation and he was subsequently discharged.

On June 18, 2015, the employer gave claimant a final last chance written warning for violating the employer's code of conduct and created a hostile work environment. Employer Exhibit 1. Claimant called a new employee a "stupid bitch" and "old and fat." Employer Exhibit 1. Claimant was warned that his job was in jeopardy. Employer Exhibit 1. On March 11, 2014, the employer gave claimant a final written warning, three day unpaid suspension for violating the employer's code of conduct and created a hostile work environment. Employer Exhibit 1. Claimant told his supervisor, "No, I am not f**king ready. I am f**king tired of being pushed." Employer Exhibit 1. On March 5, 2013, claimant signed for a written warning for violating the employer's code of conduct and created a hostile work environment. Employer Exhibit 1. Claimant responded to his operator, "f**k off." Employer Exhibit 1.

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 exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rule requiring employees to treat employees with respect is reasonable. On September 21, 2016, claimant approached Mr. Smith and stated "Your acting like a Nigger." Employer Exhibit 1. Claimant admitted he stated to Mr. Smith "You're running me like a nigger." Employer Exhibit 1. "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). Claimant had previously been warned about his offensive language. Employer Exhibit 1.

The employer has presented substantial and credible evidence that claimant used offensive language towards Mr. Smith. Claimant's offensive language was contrary to the best interests of the employer and its employees. This is disqualifying misconduct. Benefits are denied.

DECISION:

The October 11, 2016, (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.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs