

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DREW A DAHMS
Claimant

APPEAL 22A-UI-02864-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TM INCORPORATED
Employer

**OC: 12/05/21
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, TM Incorporated, filed an appeal from the January 5, 2022, (reference 04) unemployment insurance decision that granted benefits based upon the conclusion he was discharged, but due to non-disqualifying conduct. The parties were properly notified of the hearing. A telephone hearing was held on March 11, 2022. The claimant participated. The employer participated through Human Resources / Employee Relationship Manager Cary Reisch. Prior to the end of the employer's testimony, the claimant credibly testified he had not received a notice of hearing, he further explained he was only aware of the hearing due to Mr. Reisch contacting him. The administrative law judge postponed the remainder of the hearing.

A hearing was held on March 11, 2022. Exhibits 1, 2, 3, 4, and 5 were received into the record. The claimant participated. Mr. Reisch participated.

ISSUES:

Whether the claimant's separation from employment is disqualifying?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repaying benefits received due to the employer's non-participation at fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a repack technician from March 14, 2021, until this employment ended on December 8, 2021, when he was discharged. The claimant's immediate supervisor was Coordinator of Repack Michael Armbruwster.

The employer has an employee handbook. In its employee handbook, the employer has a harassment policy, which forbids harassment on the basis of race and other protected

characteristics. It further states statements or conduct may constitute harassment "when such conduct creates an intimidating, hostile or offensive working environment." It then states violations of the harassment policy are strictly prohibited. The employer provided a copy of its harassment policy. (Exhibit 2) The claimant acknowledged receipt of the employee handbook on April 15, 2021. The employer provided a copy of the claimant's acknowledgement of the employee handbook. (Exhibit 5)

On July 2, 2021, Mr. Armbruwster issued the claimant a disciplinary notice for being on his cell phone when he should be working on July 1, 2021. Mr. Armbruster made the observations that the claimant did not scan many items early in the morning or later in the day. The employer provided a copy of the written warning. (Exhibit 3)

On July 16, 2021, Mr. Armbruwster issued the claimant a disciplinary notice for riding around on a bicycle rather than working on July 15, 2021. The written warning stated, "Future incidents of this nature will incur further disciplinary actions up to and including termination of employment." The employer provided a copy of the written warning. (Exhibit 3)

On December 7, 2021, the claimant and an African American employee, Wayman Blocker, had a verbal altercation regarding how to perform work. The claimant replied, "Go fuck yourself," after Mr. Blocker explained why he felt like his way of performing the work made sense. Mr. Blocker then said, "Keep screaming at me." The claimant was loudly screaming at Mr. Blocker. He also threw papers, his security badge and his safety vest. Training Coordinator Jacob A Neuhaus, Technician Taylor Vigen, Order Fulfillment Coordinator Douglass Zimmerman and Shipping and Attachments Supervisor Bill Hantan witnessed the incident. During the incident, the claimant said, "Let's go outside to settle the matter," to Mr. Blocker. When Ms. Vigen asked him what was going on, the claimant replied, "That big fucking black guy... I am about to bear his ass. I am going to freak out." Ms. Vigen asked the claimant to calm down and suggested he should go outside with her and enjoy a cigarette to calm down. Ms. Vigen observed that Mr. Blocker was not aggressive at all in the altercation. Mr. Zimmerman was called to the area because Jacob Neuhaus reported to him that the claimant had been "yelling and throwing stuff." Mr. Zimmerman asked the claimant what was going on and the claimant replied, "Go ask that fat fucking black guy. I am going outside to go smoke." The employer provided copies of statements made by Ms. Vigen, Mr. Neuhaus, Mr. Zimmerman and Mr. Hanten. (Exhibit 4)

After separating the claimant and Mr. Blocker, Supervisor Jay Zimmer and Mr. Zimmerman met with Mr. Blocker and the claimant. During the interview, the claimant acknowledged he asked Mr. Blocker to step outside to settle the matter. The claimant continued to be agitated during the interview. Given these circumstances, Mr. Zimmer and Mr. Armbruwster decided to send the claimant home for the day. On the other hand, Mr. Blocker seemed calm and stable during the interview. They decided against sending Mr. Blocker given this difference in his demeanor.

At 2:00 p.m. on December 7, 2021, Employee Relationship Manager Carey Reisch had received witness statements from Human Resources Administrator Nikki Kaesbauer. Mr. Reisch gave these witness statements to Human Resources Manager Sean Quinn.

At 3:15 p.m. on December 7, 2021, Ms. Kaesbauer informed the claimant to stay away from the premises until December 8, 2021.

At 3:30 p.m. on December 7, 2021, Reisch called the claimant into his office and instructed him to remain away from the premises pending completion of the investigation. At that time, the claimant told Mr. Reisch he believed the employer was discriminating against him due to race because Mr. Blocker was not being sent home.

On December 8, 2021, Site Manager Jay Agnew and Mr. Zimmer terminated the claimant for the incident occurring on December 7, 2021.

The following section describes the findings of fact necessary to resolve the overpayment issue:

The administrative record DBRO shows the claimant has not received benefits from Iowa Workforce Development Department after the date of his discharge. Mr. Reisch testified personally at fact-finding. Exhibits 1, 2, 3, 4 and 5 were provided at that time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for work-related misconduct. The overpayment issue is moot because the claimant has not been paid benefits.

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.

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 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).

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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible. Generally, the administrative law judge discounts hearsay testimony which contradicts firsthand accounts. However, in this case, the claimant could not explain why each of these witnesses made statements against his interest. In fact, the claimant stated he had fairly good relationships with several of the witnesses.

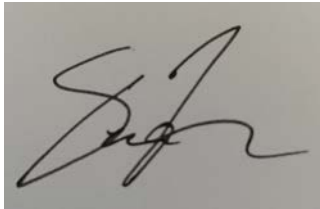
Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *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 this case, the administrative law judge finds the claimant's behavior is disqualifying because he threatened Mr. Blocker in the altercation. He repeatedly screamed the word "fuck." The administrative law judge does not find the claimant's use of the words "fat fucking black guy" as discriminatory, on the basis of race. Nevertheless, the incident is beyond what an employer has a right to expect from its employees. Benefits are denied.

DECISION:

The January 5, 2022, (reference 04) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant is deemed eligible. The overpayment issue is moot because the claimant has not received benefits.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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April 1, 2022
Decision Dated and Mailed

smn/scn