IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOHNNIE E COX
Claimant

CHRISTIAN RETIREMENT HOMES INC
Employer

APPEAL 18A-UI-08519-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/22/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 8, 2018, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 4, 2018. Claimant participated. Employer participated through Cris Vetter, Executive Director and Vicki Bell, Administrative Assistant. Employer's Exhibit 1 was admitted into the record.

ISSUE:

Was the claimant discharged due to job-connected misconduct sufficient to disqualify him from receipt of unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed initially as a part time employee from May 1994 to May 1995. On May 25, 1995 he began as a full time employee in various roles, eventually becoming director of maintenance. In 2014, he stepped down from his full-time job and became part-time or an as needed employee working primarily in the summer taking care of the gardens and the plants. The claimant has no other wages in his base period other than those from this employer.

He was discharged on June 18, 2018, for violating the rules of conduct regarding his treatment of Ms. Vetter. The claimant had been given a copy of the employer's policies and knew that he was to treat his coworkers with respect and that even one instance of rude, disrespectful or profane language could lead to his discharge. As a former member of management the claimant was familiar with the employer's rules of personal conduct.

The claimant worked one hour on Memorial Day Monday, May 28, watering flowers. Employees who work on holidays receive double their hourly pay. The claimant was not scheduled to work on Memorial Day; he voluntarily came into to work because he wanted to make sure the flowers got watered. He did not put the time down on his time card because he knew it would stop him from receiving a pro-rata payment of six hours of holiday pay for the Memorial Day holiday. Since the six hours of holiday pay was more than one hour of double time, the claimant wanted to receive the holiday pay.

On May 29, the claimant approached his supervisor, Greg, and asked him if he could put his one hour worked on Memorial Day on another day as he did not want to lose his holiday pay. Greg told the claimant to fill out a missing punch sheet for May 28, the day he actually worked.

Instead the claimant falsified his time sheet by adding one hour of time to May 30, a day when he did not work at all. Greg brought that issue to Ms. Schwitzer, who is in charge of payroll. Ms. Schwitzer spoke to the claimant and he admitted that he had he asked his supervisor if he could put the hour down on another day when he actually did not work. Claimant chose not to follow Greg's instruction and put the time he worked on a day he did not work.

Ms. Schwitzer then adjusted the claimant's time she so that he would be paid for his hours actually worked. No employer is obligated to provide holiday pay to any employee, so if they chose to offer holiday pay, they are allowed to set up the rules under which the payment will be made. Under the Fair Labor Standards Act (FSLA) the employer is obligated to accurately report time worked for all employees and to pay them for hours actually worked.

When the claimant received his paycheck, he was upset because he had not been paid for his holiday pay. Instead the employer had accurately paid him for the one hour he worked on Memorial Day.

On June 18, the claimant was upset about his paycheck when he walked into Ms. Vetter's office to talk about his paycheck. Ms. Vetter began to explain to the claimant that they had to follow the FLSA and pay the claimant for the hours he actually worked. The claimant interrupted her to say "this is bullshit." Ms. Vetter told him to calm down and to be careful with his tone of voice and how he was speaking to her. The claimant then said to her, "this is bullshit and I don't care, I can say what I want."

Ms. Bell's office is right next door to Ms. Vetter's and she heard the entire conversation between Ms. Vetter and the claimant. As the conversation progressed, Ms. Bell stood up and took her pepper spray out of her drawer and moved toward her door as the claimant was that agitated and she thought she might have to intervene and call security.

After the claimant's last comment, Ms. Vetter stood and asked the claimant to punch out and go home for the day and to calm down. She told him two or three times to calm down and go home for the day before the claimant would leave her office.

As the claimant walked out of her office, when he was in the lobby area, he turned around and said to Ms. Vetter, "you must really like to screw people." Ms. Vetter had the claimant return to her office and brought in Ms. Bell. The claimant was discharged for his repeated disrespectful comments to Ms. Vetter. The claimant was not discharged after his first initial outburst, but after his second outburst made in a public area of the building where residents, visitors and other staff could hear him.

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.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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.
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> 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).

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). 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 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).

In *Myers v Emp't Appeal Bd.*, 462 N.W.2d 736 (Iowa Ct. App. 1990), the court considered whether an isolated instance of profanity and a threat used in the workplace could constitute work-connected misconduct as defined by the unemployment insurance law. While the court ruled that such language could constitute disqualifying misconduct, the court cautioned that the language used must be considered with other relevant factors, including the context in which it was said and the general work environment. *Id.* at 738.

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 testimony of Ms. Vetter was more credible than that of the claimant. Ms. Vetter's version of events was confirmed by Ms. Bell, who heard the entire conversation. The claimant had the opportunity to walk away and cool off, but instead chose to say in a public area that Ms. Vetter liked to "screw people." He was upset because the employer was following the law on payment of wages. The claimant's comments were made in a public area of a nursing home where at least one other employee heard his comments. Under these circumstances, claimant's comments are sufficient misconduct to disqualify him from receipt of unemployment insurance benefits.

DECISION:

The August 8, 2018, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he 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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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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