IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 05A-UI-05745-DT
OC: 05/01/05 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

James E. Clarke (claimant) appealed a representative's May 18, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Gazette Communications, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 21, 2005. The claimant participated in the hearing and was represented by Darrell Walters, attorney at law. Mark Roberts, attorney at law, appeared on the employer's behalf and presented testimony from three witnesses, Craig Carmody, Robert Powell, and Chad Brown. Three other witnesses, Janie Ricklefs, Brett Toms, and Heather Emerson, were available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One through

Five were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 19, 2003. He worked full time on a 7:00 a.m. to 3:30 p.m. shift as a press operator in the employer's newspaper publication business. His last day of work was April 28, 2005. The employer discharged him on that date. The reason asserted for the discharge was creating a hostile work environment by being threatening toward another employee.

The claimant was in receipt and on notice of the employer's policies and procedures. (Employer's Exhibit Four.) The policies require employees to promote a positive work environment free from harassment. "Harassment" is defined as including but not limited to "physical or verbal abuse including unacceptable language, derogatory materials, comments or jokes, insults and slurs, unwelcome physical contact of any nature, taunting, unwarranted charges and complaints to discredit, harass or harm an employee."

On May 19, 2004, the claimant was given a three-day suspension and written warning for violation of this policy by writing "thief" on a coworker's locker nametag, for having a verbal altercation with another employee on May 5, 2004 including raised voices and the use of profanity, and another verbal altercation on May 10, 2004 with another employee, Mr. Powell, which included raised voices and the use of profanity plus the throwing of an item in the vicinity of Mr. Powell. The warning specified that "you are expected to demonstrate significant continuous improvement in developing a more positive, cooperative attitude … You will be expected to control your use of inappropriate language …and act in a professional manner from this point forward …Failure to correct and fulfill the level of cooperation expected of you in this position and to control your behavior will result in immediate termination. In addition, any future instances of workplace harassment will result in immediate termination."

The claimant was involved in another verbal altercation with another employee on November 29, 2004 that included raised voices and profanity. However, while the claimant was verbally advised that this was technically a violation of the May 19, 2004 warning, discharge did not occur as it was determined that the other employee was at least equally culpable.

At approximately 7:30 a.m. on April 28, 2005, the claimant was working with Mr. Brown, a press assistant, moving a roll of newsprint on the employer's rail system. Mr. Powell, also a press operator, was working alone but had three rolls of newsprint on the rail system, effectively blocking both of the rail lines. The claimant asked Mr. Powell if he could move one of the rolls he was working with so that the claimant and Mr. Brown could get their roll through. Mr. Powell responded that the claimant could move it, or he could wait until Mr. Powell was finished working on something else and could move it. He then turned to get another roll of newsprint. The claimant turned away for a moment, then became upset as he felt Mr. Powell was not being cooperative, and could have used the roll of newsprint that was already on the rail, thereby also removing it from blocking the claimant's way, rather than getting out another roll. He turned back to Mr. Powell, and in a raised voice said, "Oh that's right, you're Rob. You don't have to do anything. You own the place." He then threw up his arms and walked away to complain to a

supervisor. When the supervisor came back to the area, he initially advised Mr. Powell to be more cooperative, but then did instruct the claimant and Mr. Brown to move the blocking rolls themselves as Mr. Powell was working alone.

Mr. Powell made a complaint regarding the incident. After review, as a result of the prior incidents and the employer's conclusion that the claimant had used vulgar or profane language in his comment to Mr. Powell and had been "in his face," the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the incident on April 28, 2005 following the prior incidents and final warning. The employer, however, specifically concluded that the incident was harassment because it also concluded that, as testified by Mr. Powell, the claimant had used a profanity or vulgarity in his statement to Mr. Powell, and also because he had been in close physical proximity to Mr. Powell – "in his face" – when he made the statement. The claimant denied the use of profane or vulgar language, and denied that he was "in Mr. Powell's face." While the testimony of the employer's corroborating witness, Mr. Brown, substantiated the fact that the claimant did raise his voice more than necessary, Mr. Brown's testimony in fact supported the claimant's contention that he was not in Mr. Powell's face, but was at least ten to fifteen feet away, and that he had not used a profanity or vulgarity. While the claimant's raising of his voice and the somewhat snide comment he made to Mr. Powell was not consummately professional, in the absence of other context such as established use of profane or vulgar language or threatening physical proximity, the administrative law judge cannot conclude that the claimant's conduct in this incident was "harassment." Under the circumstances of this case, the claimant's expression of his frustration was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's May 18, 2005 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/sc