IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

JEFFREY WITTMAN
Claimant

DEERE & CO – DES MOINES WORKS
Employer

APPEAL NO: 13A-UI-12835-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/29/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 1, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 10, 2013, and continued on January 6, 2014. The claimant participated in the hearing with Union Representative Jammie Carroll and Committeeman John Vaughn. Jim Rottinghaus, Manager of Labor Relations; Paul Blalock and Joshua MacLean, Labor Relations Representatives; John Hogan, Assembler; Frank Harty, (Attorney for the employer during the first hearing date); Joe Quinn, (Attorney for the employer during the second hearing date); and Ryan Leemkuil, Associate Attorney (observer); participated in the hearing on behalf of the employer. Department's Exhibits D-1, D-1-A and D-1-B and Employer's Exhibits One through Five were admitted into evidence. The administrative law judge takes official notice of the administrative record.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assembler for Deere & Company Des Moines Works from September 3, 2010 to October 4, 2013. On October 2, 2013, assembler John Hogan reported to Labor Relations Representative Paul Blalock that the claimant called him a "stupid fucking nigger" (Employer's Exhibit Two). Mr. Hogan was waiting for the claimant to put a rock shaft on and the claimant told him he needed to learn to "do this fucking job" because he was not always going to be there to do it. He was annoyed with Mr. Hogan and took the controller for the hose out of Mr. Hogan's hand and as he walked back by made the racial slur quoted above. Mr. Hogan not only clearly heard him make the statement but could also read his lips. The claimant waited a few minutes and then walked over to the claimant and asked him why he said that and the claimant replied, "I didn't say that," before Mr. Hogan said, "Yes you did. You called me a nigger" (Employer's Exhibit Two). The parties had worked together for three years without incident and had a good working relationship. Mr. Hogan told Mr. Blalock of two other

situations that occurred in the last month involving the claimant making racial statements as well. The first incident occurred when the claimant and Mr. Hogan were in line to clock out when two African American janitorial employees went by and the claimant asked Mr. Hogan if he was going to go get "high with them" after work and whether they were his brothers. The second situation occurred on a Friday when a female, African American janitorial employee walked by and the claimant asked Mr. Hogan if he was going to "hit that ass from the back that weekend." The claimant had no relationship with the female janitor. Mr. Hogan reported the final incident, as well as the two previous incidents, to Mr. Blalock who reported it to Manager of Labor Relations Jim Rottinghaus who delegated the responsibility for investigating the situation to Labor Relations Representative Josh MacLean. As Mr. MacLean noted, and Mr. Hogan had told him, there were no witnesses to the claimant's statement, so his investigation was limited to speaking to the parties.

The claimant received a three-day in-house suspension November 1, 2012, and a written warning August 23, 2013, for failing to work mandatory Saturdays (Employer's Exhibit Three). He was also suspended for one month January 10, 2013, for falsifying a doctor's note. The claimant provided the employer with a note from his physician, dated December 14, 2012 stating, "Please excuse Jeff from work on Dec. 13, 2012. He was seen in our office Dec. 12, 2012." (Employer's Exhibit Four, Page 3). Before leaving the doctor's office the claimant noticed the note did not say "unable to work" so he went back into the doctor's office and had the office personnel change it (Employer's Exhibit Four, Page 4). He then changed, "He was seen in our office December 12, 2012" to "He was seen in our office Dec. 14, 2012" (Employer's Exhibit Four, Page 4).

The employer uses a progressive disciplinary policy but employees may be discharged immediately for serious offenses. After the investigation was completed the claimant was discharged for offensive racial name calling in violation of the employer's policy against discrimination and harassment (Employer's Exhibit One and Four).

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

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.

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.

While the claimant denies making the extremely inappropriate and offensive remark, Mr. Hogan had no animosity toward the claimant, as they had a good working relationship prior to this incident, and he had no apparent reason to lie about the situation. When the parties' testimony is so divergent, and there are no other witnesses, credibility becomes a method for tiebreaking. Mr. Hogan had no blemishes on his work record that would indicate a propensity for dishonesty. The claimant, on the other hand, altered a doctor's note, changing the date he could return to work from December 12, 2012, to December 14, 2012. While that does not automatically mean he is not being truthful in his denial of using a racial slur when speaking to Mr. Hogan October 2, 2013, it does tip the scales regarding credibility in Mr. Hogan's favor.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The issue of whether the employer participated in the fact-finding interview and whether the overpayment can be waived or will be charged to the employer's account is remanded to the Claims Section for an initial determination and adjudication. The claimant is overpaid benefits in the amount of $5,320.00.

DECISION:

The November 1, 2013, reference 01, decision is reversed. The employer's appeal is timely. 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. The issue of whether the employer participated in the fact-finding interview and whether the overpayment can be waived or will be charged to the employer's account is remanded to the Claims Section for an initial determination and adjudication. The claimant is overpaid benefits in the amount of $5,320.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/css