

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 through 3, the administrative law judge finds: The claimant was employed by the employer as a full-time overnight stocker from September 16, 2004 until he was discharged on August 26, 2005. The claimant was discharged for inappropriate language and an incident involving a confrontation with a co-worker, Donnie, during the evening of August 25, 2005. Earlier in the evening Donnie had been helping the employer's witness, Todd McCoy, Night Lead, run freight. Donnie saw the claimant talking to a co-worker and felt that the claimant should be helping them run the freight. The claimant had also heard that Donnie was making obscene comments about the claimant, but this was only second hand. In any event, when the claimant and Donnie went on a break, the claimant approached Donnie in the break room and told him that he did not appreciate the comments that the claimant had heard that Donnie had made about the claimant. Apparently, this led to an escalation in which both were yelling and loud and using profanity. Both used the work "fuck" back and forth repeatedly. Both made threats to the other. At one point the claimant asked Donnie if he had "sucked dick" to get his recent promotion. The confrontation continued and escalated. Mr. McCoy observed this confrontation and repeatedly told both to stop and eventually after being repeatedly told to stop they did. Both were discharged for this confrontation. The confrontation occurred in the presence of other co-workers. The claimant's exit interview appears at Employer's Exhibit 1. The employer has policies, a copy of which the claimant received and of which he was aware, prohibiting any form of discrimination or harassment and prohibiting slurs or negative stereotyping and offensive comments and intimidating acts and any other conduct showing hostility. These policies appear at Employer's Exhibit 2. The claimant's statement about this incident appears at Employer's Exhibit 3

Pursuant to his claim for unemployment insurance benefits filed effective August 28, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,176.00 as follows: \$196.00 per week for six weeks, from benefit week ending September 3, 2005 to benefit week ending October 8, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on August 26, 2005. In order to be disqualified to receive unemployment insurance benefits, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. There is really very little disagreement between the various witnesses. On August 25, 2005, the claimant got into a verbal confrontation with a co-worker, Donnie, in which both used profanity including the word "fuck" repeatedly back and forth and in which the claimant asked Donnie if he had "sucked dick" to get a recent promotion. The only real disagreement is whether the claimant was physically blocked in the corner. The claimant testified that he was but a first hand witness, Todd McCoy, Night Lead, testified that neither was cornered and that both made threats. Even the claimant conceded that he initially approached Donnie in the break room about obscene comments the claimant had heard from others that Donnie was making about the claimant. It appears to the administrative law judge that the claimant really initiated the confrontation. The claimant testified that he did not believe that this would cause a confrontation, but the administrative law judge disagrees. If the claimant had not approached Donnie no confrontation would have occurred. It may well be that once the confrontation began it was escalated more by Donnie than the claimant, but the administrative law judge is constrained to conclude that both were at fault and the claimant was at fault first. The employer has policies as shown at Employer's Exhibit 2, prohibiting such conduct. Accordingly, the administrative law judge is constrained to conclude that the claimant's acts on the evening of August 25, 2005 were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are therefore disqualifying misconduct.

In Myers v. Employment Appeal Board, 462 N.W.2d 734 (Iowa App. 1990), the Iowa Court of Appeals held that 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. Here, the target of abusive name-calling was present even if the name-calling may have been isolated. The name calling here was substantial, significant and serious and occurred in the break room in the presence of other employees. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,176.00 since separating from the employer herein on or about August 26, 2005 and filing for such benefits effective August 28, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 16, 2005, reference 01, is reversed. The claimant, Christopher W. Coleman, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,176.00.

dj/pjs