IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ULISES ORO-SANTOS Claimant **BURKE MARKETING CORPORATION** Employer	**APPEAL 19A-UI-00978-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/06/19** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 28, 2019, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for violation of a known company rule. The parties were properly notified of the hearing. A telephonic hearing was held on February 18, 2019. The claimant, Ulises Oro-Santos, participated. The employer, Burke Marketing Corporation, participated through Shelli Seibert, HR Manager. Spanish/English interpreter Bianca (ID Number 11762) of CTS Language Link assisted with the hearing. Employer's Exhibits 1 and 2 were received but were not admitted as they were not provided to the claimant prior to the hearing.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time, most recently as a pack room laborer, from January 29, 2018, until January 9, 2019, when he was discharged. On December 28, 2018, claimant, African-American co-worker Peter, and several other co-workers were changing out of their work clothes in the locker room. Claimant's locker was next to Peter's locker, so the two were changing close to one another. Claimant alleges that while he was bent over stepping out of his pant leg, Peter put his crotch up toward claimant's face. Claimant became upset by this and called Peter a motherfucker, a son of a bitch, and a monkey.

The plant was shut down over New Year's. Both claimant and another co-worker reported this incident to their supervisor on or about January 2. The supervisor conducted an initial investigation, and he then informed Seibert on January 4 about the incident. Seibert took down the names of claimant, Peter, and the four witnesses, and she spoke with all of them. Claimant was suspended on January 4, pending the outcome of the investigation. During her investigation, claimant admitted calling Peter a monkey multiple times. Seibert could not substantiate that Peter put his crotch in claimant's face. Therefore, claimant was discharged from his employment.

The employer maintains a zero-tolerance policy prohibiting discrimination and harassment in the workplace. The employer also conducts annual training on diversity, inclusion, and discrimination. Claimant attended this training, and he received a copy of the employee handbook containing the written policy. Claimant acknowledges that discrimination was prohibited in his workplace. Claimant had no prior warnings for this issue.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to disqualifying, job-related misconduct. Benefits are withheld.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). 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).

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 credible. Further, the administrative law judge did not find claimant's testimony credible that he did not know "monkey" was an offensive, racist term.

In this case, claimant was discharged for calling a co-worker a racially-charged name multiple times. Claimant called his African-American co-worker a monkey and used other profanity toward him, demonstrating a willful and deliberate disregard for the employer's anti-discrimination policies and practices. This is misconduct even without prior warning. Even if this co-worker had done what claimant alleged, that is no excuse for racist language. The administrative law judge finds that claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

DECISION:

The January 28, 2019, (reference 01) unemployment insurance decision is affirmed. 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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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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