IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

FELIX R AVALOS Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 18A-UI-05763-DB** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/29/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 21, 2018 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits based upon his discharge from employment. The parties were properly notified of the hearing. An in-person hearing was held in Des Moines, Iowa on June 27, 2018. The claimant, Felix R. Avalos, participated personally and was represented by attorney Philip Miller. A Spanish interpreter was provided for the claimant. The employer, Swift Pork Company, participated through witness Nicolas Aguirre. Claimant's Exhibits A – D were admitted. Employer's Exhibits 1 – 7 were admitted.

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 began working for the employer on June 1, 2004. His last day physically worked on the job was May 3, 2018, when he was suspended. He was discharged from employment on May 9, 2018. Claimant's job duties included leading hogs to slaughter. The employer operates a pork processing facility. Donnie Box was claimant's immediate supervisor.

Claimant worked in the barn area. Mr. Box used profane language toward claimant on numerous occasions calling him "bitch" and "fucker". Mr. Box also called claimant "stupid". Claimant made no complaints to human resources or management regarding Mr. Box's use of profane language towards him.

During the course of claimant's employment, he received a verbal warning on December 12, 2014 for poor work performance. See Exhibit 5. Claimant also had a disciplinary meeting on October 11, 2012 regarding poor work performance. See Exhibit 4. No further discipline was issued to claimant during the course of his 14-year employment with the company prior to his discharge.

The employer has a written policy governing employee's actions in the workplace. Claimant received a copy of the written policy as part of the employee handbook. The policy speaks generally about best work environment and prohibits verbal harassment. However, the policy does not specifically refer to use of profane language in the workplace.

Approximately four weeks prior to May 3, 2018, claimant and Mr. Box argued about how the claimant was directing the hogs from their pen. Claimant asked Mr. Box to go to the office so they could resolve their differences. Mr. Box refused. Mr. Box yelled at claimant about his work performance in not running the hogs a specific way and claimant stated to Mr. Box, "what's your fucking problem with me?" The two eventually met with Mr. Aguirre and the Union Vice President, Mike Graves in the office that day. During the meeting, Mr. Box discussed with claimant his work expectations. Claimant then refused to shake Mr. Box's hand on two separate occasions when the meeting concluded. Claimant was not disciplined in any way for his actions in using profane language at Mr. Box or refusing to shake his hand at the meeting. Claimant was never told during the meeting that use of profane language towards his supervisor could lead to his discharge.

The final incident leading to discharge occurred on May 3, 2018. On this date, Mr. Box yelled at claimant in a loud tone of voice and called him "stupid". He also yelled at him, "don't you know this is your job" and "do we always need to tell you what to do". Claimant responded to Mr. Box stating "shut the fuck up". Claimant was then instructed to go to the human resource's office, which he did. Mr. Aguirre took claimant's verbal statement in the office and he was suspended pending further investigation. Claimant admitted to Mr. Aguirre that he had said this comment to his supervisor. In his statement, claimant did tell Mr. Aguirre that Mr. Box was yelling at him. See Exhibit 3. The employer telephoned the claimant on May 9, 2018 and told him that he was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, 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*.

The administrative law judge had the ability to observe both witnesses' appearance and conduct in person during the hearing. The administrative law judge finds that the testimony of the claimant that Mr. Box yelled at him and used profane language towards the claimant on numerous occasions is credible. Claimant's testimony that Mr. Box was never disciplined for these actions is credible. Claimant's testimony that he was never instructed (in writing or verbally) that use of profane language would subject him to discharge is credible.

The final incident involved claimant using profane language in a disrespectful manner towards his supervisor. This was in response to his supervisor calling him stupid and yelling disrespectful comments towards him. Claimant made no threat of violence and the comment did not occur in front of customers. The comment did not include any threat of future misbehavior or insubordination. The comment did not include discriminatory content in the language. The general work environment included claimant's supervisor calling him "stupid" and using profane language towards him in the past, including "fucker" and "bitch". Claimant's supervisor was not disciplined for this and claimant was not disciplined for using profane language at his supervisor in the past. Further, claimant was never instructed (in writing or verbally) that use of profane language in a disrespectful context towards his supervisor would lead to his discharge.

Claimant's unintentional outburst, in response to being called "stupid" again, was an isolated incident of poor judgment and claimant is guilty of no more than "good faith errors in judgment." Iowa Admin. Code r. 871-24.32(1)(a). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986). His actions were not an intentional and substantial disregard of the employer's interest that rises to the level of willful misconduct.

It is true that an employer does have the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning, Inc*. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors…." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties

(2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning, Inc*. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983).

However, in this case the fact that use of profane language in the workplace was tolerated by the employer is supported by the fact that claimant had, in the recent past, used profane language towards his supervisor and was not disciplined, or even told that his actions using profane language were considered to be in violation of company policy. No written policy was given to claimant that would have put him on notice that use of profane language would be a breach of his material duties and obligations of employment. He witnessed his supervisor, on numerous occasions, use profane language in a disrespectful way towards him and not receive discipline. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or warning.

An employee is entitled to fair warning that the employer will not tolerate certain performance and conduct. When the employer tolerates this type of conduct, without discipline, or informing the claimant that it considers those actions to be a breach of the employee's duties and obligations, the employer has failed to set forth the duties, obligations and standards of behavior that are expected of employees. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. It is the employer's obligation to set forth the standards of behavior that it expects of employees and to enforce those standards equally, for all employees, including management. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The May 21, 2018 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/rvs