IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

LOSIANE DORCIN Claimant **SWIFT PORK COMPANY** Employer	**APPEAL NO. 23A-UI-00330-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/18/22** **Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

On January 13, 2023, the employer filed a timely appeal from the January 5, 2023 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on December 17, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on January 31, 2023. Losiane Dorcin (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Patrick Brue represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Losiane Dorcin (claimant) was employed by Swift Pork Company, a/k/a JBS, as a full-time General Laborer from July 2020 until December 17, 2022, when Tay Tun, Assistant Human Resources Manager, discharged her from the employment. The claimant worked on the cut floor and was assigned to the St. Louis ribs line. The claimant was assigned to the second shift, 3:30 p.m. to about midnight, Monday through Friday. Production Supervisor Jesus Gonzalez was the claimant's immediate supervisor. Mr. Gonzalez is still with the employer. Mr. Tun recently separated from the employer.

The final incident that triggered the discharge occurred on December 9, 2022. On that day, Mr. Gonzalez observed that ribs had spilled off of the production table onto the floor of the cut floor. The ribs on the floor had to be discarded. When Mr. Gonzalez addressed the claimant

about the matter, the claimant stated it was too much work and she had been unable to keep up. Mr. Gonzalez continued to address the issue with the claimant. The employer witness does not know what Mr. Gonzalez said to the claimant leading up to the claimant uttering profanity. During the interaction, the claimant became agitated, began waiving her arms, and yelled 'What the fuck?" Mr. Gonzalez escorted the claimant to the human resources office for a meeting with Mr. Tun. While at the human resources office, the claimant asked what was wrong with stating "What the fuck?" The claimant is a non-native English speaker, speaks in broken English, and her native language is Haitian/creole French. The employer used an interpreter when speaking with the claimant. The employer suspended the claimant and subsequently discharged the claimant from the employment. The employer has a Best Work Environment policy (BWE) that prohibits profanity in the workplace. The employer reviewed the policy with the claimant during her orientation and annually thereafter.

In making the decision to discharge the claimant from the employment, the employer also considered a November 25, 2022 interaction between the claimant and Mr. Tun. In that instance, the employer assigned the claimant for the day to work in a bagging production job in support of her production line due to being short-staffed in that area. The claimant balked at the reassignment, which led to the meeting with Mr. Tun. During the meeting, the claimant removed her employee ID, stated she was quitting, and left the human resources area. The employee allowed the claimant to continue in the employment, but issued a "final written warning" for job abandonment.

The claimant established an original claim for benefits that was effective December 18, 2022. Iowa Workforce Development set the weekly benefit amount at $572.00. The claimant received $2,288.00 in benefits for the four weeks between December 18, 2022 and January 14, 2023. Swift Pork Company is the sole base period employer.

On January 4, 2023, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employment. The employer, through its representative, Talx/Equifax, received proper notice of the fact-finding interview. Equifax submitted written notice that Bethany Whitehair, Unemployment Insurance Consultant, would represent the employer at the fact-finding interview and provided a number and extension for the fact-finding interview. At the time of the fact-finding interview, the deputy made two attempts to reach Ms. Whitehair. On the first attempt, the deputy left a message and requested a return call. Ms. Whitehair returned the call and left a message stating the deputy should use the information previously provided in the SIDES protest. The deputy then called Ms. Whitehair to let her know there was no information in the SIDES protest. The deputy was able to speak with Ms. Whitehair, who stated the employer had provided no other information. The SIDES protest gives dates of employment, provides the claimant's job title, and states the claimant was discharged, but provides no particulars regarding the conduct or events that led to the discharge. The claimant participated in the fact-finding interview and provided a candid verbal statement devoid of an any attempt to mislead the deputy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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). The Legislature recently codified the misconduct definition along with a list of types of disqualifying misconduct. See Iowa Code section 96.5(2)(d).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r.871 -24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

An employer has 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 (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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record falls short of proving misconduct in connection with the employment by a preponderance of the evidence. The employer has a legitimate interest in maintaining a civil, orderly, productive workplace free of waste and disruption. Importantly, a significant portion of the context of the claimant's utterance is conspicuously missing from the evidence presented by the employer. The employer witness was not present for the December 9, 2022 interactions that triggered the discharge. The employer elected not to present testimony from Mr. Gonzalez or Mr. Tun. The evidence in the record omits Mr. Gonzalez's contribution to the exchange leading up to the claimant's profane utterance. The claimant's particular utterance is one that is usually uttered as a response. The employer witness would like to believe, based on the Best Work Environment (BWE) policy, that Mr. Gonzalez did not direct profanity or other derogatory comments at the claimant, but the employer simply does not know what Mr. Gonzalez said to the claimant. The employer could have supplied that evidence through Mr. Gonzalez's testimony. Two additional factors are worth noting. First, the physical context of the claimant's utterance was a packing plant cut floor, a place where one would not be shocked to hear profanity now and again. Second, the claimant is a non-native English speaker, speaks in broken English, and simply may not have appreciated the full impact of the utterance. This last notion is supported by the claimant's question to Mr. Tun, regarding what was wrong with the utterance.

The December 9 incident followed the November incident wherein the claimant balked in response to a temporary change in assigned duties. The evidence does not establish a pattern of unreasonable refusal to comply with reasonable directives.

The claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The January 5, 2023 (reference 01) decision is affirmed. The claimant was discharged on December 17, 2022 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

February 2, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.