

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

THOMAS HAMANN
Claimant

NORTHWEST BLVD INC MCDONALDS #282
Employer

APPEAL 20A-UI-01574-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/02/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Northwest Boulevard Inc. McDonalds #282, filed an appeal from the February 11, 2020 (reference 04) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 9, 2020. The claimant participated personally. The employer participated through Beverly Maez, hearing representative for Employer’s Unity LLC. Amanda Smysor, area supervisor, and Ian Dulla, general manager, testified. Employer Exhibits 1-4 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer’s account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a maintenance man and was separated from employment on January 22, 2020, when he was discharged (Employer Exhibit 1).

At the time of hire, the claimant was trained on employer rules and procedures, which include discipline for violent or threatening conduct. The claimant had no prior warnings before discharge for similar conduct. The decision to discharge the claimant was made based upon a single incident with a female coworker, T.B., on January 21, 2020.

He and T.B. had a friendly work relationship and often joked around. During a conversation that day, T.B. said to the claimant, "I'm gonna hit you". Claimant did not perceive the comment to be a threat. The evidence is disputed as to whether he said back, "oh, like your boyfriend?" or "I'm going to take you to the bathroom and slam your ass on the floor". Both comments were in reference to a recent domestic violence incident which had occurred between the claimant and her boyfriend on employer premises. Claimant immediately apologized after making the comment, and acknowledged he should not have made the comment. Claimant did not intend to upset or threaten T.B. who later reported the comment to management. Claimant was discharged for the comment he made. T.B. was not discharged for saying to Claimant, "I'm going to hit you."

The administrative record reflects that claimant has received unemployment benefits in the amount of \$915.00, since separation with this employer. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Amanda Smysor attended.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.

The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe, or threatening conduct in the workplace, in an era where violence in the workplace is real. 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). 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).

Here, the claimant was discharged for a single comment made to coworker, not in the presence of any witnesses and not accompanied by vulgar or discriminatory content. The administrative law judge in no way condones the claimant's conduct on January 21, 2020. Any comment he made “joking” about his coworker previously being assaulted by her boyfriend on the employer premises was unprofessional, unkind and insensitive. Regardless of the exact comment Claimant made to T.B. on January 21, 2020, it alluded to engaging in physical violence. If the employer concluded the isolated comment made (followed by an immediate apology) by Claimant violated employer's work rules and expectations that an employer has the right to expect of employees, it cannot ignore that T.B. initiated the conversation in which she told Claimant she was going to hit him. T.B.'s comment reasonably would also violate a rule against threats in the workplace. The claimant was fired for his part in the confrontation. T.B. was not.

Even though claimant may have violated employer's rules, the consequence was more severe than other employees received for similar conduct. The disparate application of the rule cannot support a disqualification from benefits. Therefore, the claimant's separation from employment does not disqualify him from receiving unemployment insurance benefits.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under

the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is allowed benefits, the issues of overpayment and relief of charges for the employer are moot, and will not be further discussed in this decision.

DECISION:

The unemployment insurance decision dated February 11, 2020 (reference 04) is affirmed. The claimant was discharged but for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

Decision Dated and Mailed

jlb/rvs