IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ERIC MOCKMORE DELANO Claimant **WEST LIBERTY FOODS LLC** Employer	**APPEAL 20A-UI-12551-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/19/20** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 30, 2020, (reference 02) unemployment insurance decision that denied benefits based upon his use of profanity. The parties were properly notified of the hearing. A telephone hearing was held on November 20, 2020. The claimant, Eric Mockmore-Delano, participated in the hearing. The employer, West Liberty Foods, participated through Human Resources Manager Karyn Goldensoph. Kaitlynn Marshall-Delano, claimant's spouse, testified as a fact witness for the claimant.

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 as a lung gun cropper rotator from July 3, 2019, until this employment ended on April 19, 2020, when he was discharged.

West Liberty Foods has a policy against the use of profanity in the plant in its employee handbook. Claimant received the employee handbook shortly after beginning employment. Other than the date of incident, West Liberty Foods had not found claimant's behavior to have violated this policy in its employee handbook.

On April 19, 2020, claimant was walking out of the plant while speaking to his spouse, Kaitlynn Marshall-Delano, with Human Resources Director Karen Taylor ("Taylor") and Plant Manager Tom Alberpi ("Alberpi") following closely behind him. Claimant began the phone call expressing frustration that he had to work unexpectedly because there was a problem with the production line and that he was the only one who could pick up his son at school due to the fact he had the couple's only vehicle. Claimant also spoke in a disparaging way about how West Liberty Foods' procedures regarding mitigating the spread of Covid19 in the plant. In particular, claimant said "if someone was going to get sick West Liberty Foods was just going to hire somebody else." At that point, Alberpi asked claimant what he had just said and claimant replied, "Well I think that it is bullshit." Claimant displayed his anger by stomping out of the building. Claimant continued to

walk out to his car. Alberpi grabbed claimant's shoulder to get his attention and claimant exclaimed, "Get the fuck away from me." Alberpi then told claimant during this exchange that if he did not like working there, then there was no need for him to come back.

Claimant was scheduled to take vacation on the following day, April 20, 2020. On April 21, 2020, claimant returned to work. On that date, Alberpi told claimant he had been terminated on April 19, 2020. Alberpi did not provide the reason for terminating claimant.

Claimant recalled a time when a maintenance worker used the word "bitch" in reference to him. Claimant said this incident was reported to the Human Resources Department, but did not specify who reported it. Claimant went on to say that there was an investigation of the incident, but claimed the maintenance worker was not disciplined.

REASONING AND CONCLUSIONS OF LAW:

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

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 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. An employer has a "right to expect decency and civility from its employees." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990). Profanity or other offensive language in a confrontational, name-calling, or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. *See Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990), overruling *Budding v. Iowa Dep't of Job Serv.*, 337 N.W.2d 219 (Iowa Ct. App. 1983). "We have recognized that vulgar language in front of customers can constitute misconduct, *Zeches v. Iowa Dep't of Job Serv.*, 333 N.W.2d 735, 736 (Iowa Ct. App. 1983), as well as vulgarities accompanied with a refusal to obey supervisors. *Warrell v. Iowa Dep't of Job Serv.*, 356 N.W.2d 587, 589 (Iowa Ct. App. 1984).

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, 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).

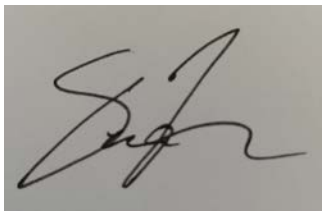
Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *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). While there is no citation for discriminatory content, but there is no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment and other factors as well.

In the present case, claimant used two forms of profanity “bitch” and “fuck” in an exchange with two of the highest ranking individuals at that employer, Alberpi and Taylor. Conflicts in the workplace are bound to occur and it is normal that an employee may become upset with a supervisor. It is also understandable that claimant was frustrated with the situation. However, frustration does not excuse claimant’s behavior. Using this language in conversation with two high ranking executives violates commonly held workplace standards.

While claimant attempts to argue disparate treatment, as compared to the maintenance man, the behavior there is not as aggravating for three reasons. First, claimant’s language was used in conversation with high ranking executives, in the context of a greater conversation that signaled future misbehavior or insubordination. Second, claimant’s two forms of profanity in his conversation rather than what he describes as the maintenance worker’s one-off reference to him being a “bitch.” Third, claimant’s statements were made in combination with outward displays of anger. Claimant’s conduct on April 19, 2020 is considered disqualifying misconduct, even without prior warning. Benefits are denied.

DECISION:

The September 30, 2020, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant is deemed eligible



Sean M. Nelson
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December 30, 2020
Decision Dated and Mailed

smn/scn