

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MEGAN M OSHAUGHNESSY
Claimant

APPEAL 21A-UI-25422-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEYLIFE
Employer

**OC: 08/22/21
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant/appellant, Megan M. O'Shaughnessy, filed an appeal from the October 21, 2021, (reference 02) unemployment insurance decision that denied benefits, finding she was discharged 08/25/21 for conduct not in the best interest of employer. After proper notice, a telephone hearing was conducted on January 14, 2022. Claimant participated personally. Employer/respondent, Wesleylife, failed to participate. Judicial was taken of the administrative records. The fact-finding documents were admitted into evidence over claimant's objection.

ISSUE:

Was the separation a layoff, discharged for misconduct or voluntarily quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence and record, the undersigned finds:

Claimant was employed fulltime as the executive chef whose schedule varied. She started March 1, 2012 and her last day worked was September 25, 2021, when she was also discharged that same date for violating company rules. Employer has an employee handbook. Claimant received a copy in 2012, when she was hired. Claimant has access to the current copy online.

The parties participated in fact finding, with employer submitting documents in fact finding. Employer provided a copy of the Team Member Conduct Procedure, which addresses professional and courteous treatment of residents, clients, visitors, and co-workers (2a) and not to use obscene or abusive language (2c). Claimant's August 25, 2021 discharge letter states she was terminated for professionalism issues and how she verbally treats co-workers and how other co-workers and residents have heard this treatment.

Employer submitted a one-page outline of what happened August 23 and 24, 2021 regarding three incidents. Claimant agrees she said what is reported in incident three but asserts it happened earlier in the timeframe and was said to just her subordinate. Claimant disputes how

loud she was in incident two, but generally agrees with it and that she was upset. For incident one, she agrees she was upset, and probably said “this is fucking ridiculous.”

Provided a September 24, 2014 written warning regarding verbal outburst utilizing profanity. Provided a September 16, 2014 verbal warning regarding an incident fail to perform all duties, arrived late and then left without advising her supervisor of an early departure. Claimant asserts the two September matters were over the same incident, even though they covered different issues. Claimant does not dispute what she was disciplined for did not happen. Provided a May 19, 2016 verbal coaching incident over the use of language that a resident and co-worker overheard. Claimant does not dispute the incident.

Claimant admits she uses profanity routinely in the kitchen and the use of profanity in the kitchen is not uncommon. Claimant is aware they get loud in the kitchen and won't realize sometimes how voices carry. While claimant may have had no intent for residents to overhear her profanity, they have.

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

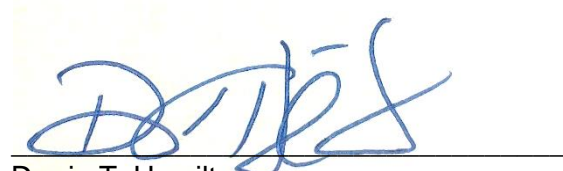
an aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.

In the present case, claimant has utilized profanity, in violation of the employee handbook. Claimant stated, "this is fucking ridiculous" regarding a dinner even where the number of attendees kept growing. While frustrating, her profanity and comments about residents getting to do whatever they want were overheard by residents. Claimant was previously coached, warned and disciplined for her inappropriate behavior for conduct similar to this, so she knew this type of behavior is not tolerated. Furthermore, the conduct happened in the view of coworkers and within earshot of residents (customers).

The employer has presented substantial and credible evidence that claimant violated workplace rules regarding conduct. This is disqualifying misconduct. Benefits are denied.

DECISION:

The October 21, 2021, (reference 02) unemployment insurance decision that denied benefits is **AFFIRMED**. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Darrin T. Hamilton
Administrative Law Judge

April 4, 2022
Decision Dated and Mailed

dh/mh