

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**REBEKAH TRASTER**  
Claimant

**APPEAL 21A-UI-24248-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SLB OF IOWA LC**  
Employer

**OC: 09/19/21  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant, Rebekah Traster, filed an appeal from the October 25, 2021, (reference 01) unemployment insurance decision that denied benefits effective September 24, 2021 based upon the conclusion that she was discharged for violation of a known rule. The parties were properly notified of the hearing. A telephone hearing was held on January 25, 2022. The claimant participated and testified. The employer participated through Human Resources Manager Karen Beard and General Manager Todd Berkey. Exhibits 1, 2, 3, and 4 were received into the record.

**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:

The claimant started working for the employer, SLB of Iowa LC, as a full-time associate from October 7, 2020, until September 24, 2021, when she was discharged. The claimant's immediate supervisor was General Manager Todd Berkey.

The employer has a harassment, a sexual harassment, a discrimination and "No Jerks," policies in its employee handbook. The claimant acknowledged receipt of the handbook on October 7, 2020. The employer provided a copy of the claimant's acknowledgment of the policy. (Exhibit 3) The No Jerks policy emphasizes that every coworker, vendor and customer must be treated with respect. The policy itself does not state what occurs if a coworker violates this policy. The employer's harassment and discrimination policy forbid employees from targeting their fellow employees with behavior because of their protected characteristics. The employer provided copies of pages from the employee handbook displaying these policies. (Exhibit 4)

On September 22, 2021, the claimant received a final written warning for cash handling and not following the cash tip procedures. The employer provided a copy of the final written warning. (Exhibit 1)

On September 23, 2021, Tom Penisten, the employee who reported the claimant's cash handling violation reported to Ms. Beard that the claimant told him that he had been "acting like a little bitch" or "crying like a little bitch," earlier that day. Mr. Berkey testified that she interviewed Emily Schmeiser, Emily Kellum and Maraceja Croff after receiving this report from Mr. Penisten. Mr. Berkey further testified that these employees confirmed Mr. Penisten's allegation that the claimant made a statement similar to what was reported. Ms. Beard decided not to provide testimony or written statement from any of these associates because she believed Mr. Berkey's hearsay testimony would be sufficient. The claimant did not make the statement.

On September 24, 2021, the claimant received a termination notice. The termination notice indicates the claimant's behavior on September 23, 2021 violated the No Jerks policy and created a hostile work environment. The employer provided a copy of the termination notice. (Exhibit 2) The claimant denied making the statement.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct.

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).

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's denial that she made the statement more credible than the employer's allegations she made the statement.

The claimant was the only one who could testify from first-hand experiencing. Mr. Berkey and Ms. Beard could only testify to hearsay testimony because Ms. Beard did not make the witnesses available to testify. The employer did not provide circumstances suggesting these witnesses could not testify due to a credible threat of retaliation. There are other problems with the employer's testimony. During the hearing, the employer's witnesses seemed to testify that the claimant made one statement. Yet, the termination notice itself indicates the claimant made multiple similar statements. The employer did not clarify in its testimony the number of times the statement was allegedly made or what time of day it occurred.

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).

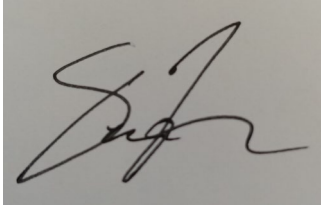
An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *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.

The employer has failed to provide credible evidence suggesting the claimant engaged in the behavior alleged. It is the employer's burden to provide evidence supporting its position that the claimant was discharged for work-related misconduct. When an employer decides to not provide firsthand testimony, it runs the risk it will not meet its burden of persuasion regarding a discharge. Benefits are granted.

**DECISION:**

The October 25, 2021, (reference 01) unemployment insurance decision is reversed. Benefits are granted, provided she is otherwise eligible.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'S. Nelson'.

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Sean M. Nelson  
Administrative Law Judge  
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February 18, 2022  
Decision Dated and Mailed

smn/scn