IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

GARY BAETHKE
Claimant

LOWE'S HOME CENTERS INC
Employer

APPEAL NO: 12A-UI-00148-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/27/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Gary L. Baethke (claimant) appealed a representative's December 29, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Lowe's Home Centers, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 2, 2012. The claimant participated in the hearing and was represented by Benjamin Roth, Attorney at Law. The employer's representative received the hearing notice and responded by faxing a statement to the Appeals Section on February 1, 2012, seeking to "withdraw the appeal." The employer did not provide the names or numbers of any witnesses to participate in the hearing; therefore, the employer did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Can the employer "withdraw" its challenge to the claimant's eligibility at the point of the hearing on the claimant's appeal? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on February 13, 2003. He worked full time as a delivery driver in the employer's Waterloo, Iowa store. His last day of work was November 29, 2011. The employer discharged him on that date. The reason asserted for the discharge was the use of vulgar language toward a supervisor.

The claimant had a general corporate work schedule for the year so that he could plan his personal time accordingly; this schedule had shown him not working on November 21, the Wednesday before Thanksgiving. On November 15 the claimant saw that the specific work period schedule specifying what shifts were to be worked had him listed as working a shift on

November 22. On November 16 the claimant approached his manager and indicated that he saw that he was on the schedule for November 21 even though the corporate calendar had him off that day, and indicated that he had already made plans for November 21. The manager was dismissive. A short time later the claimant again approached the manager while they were in the receiving area, away from any customers, and he again attempted to explain the difficulties this would pose for him. The manager was again dismissive and started to walk away. As the manager walked away, the claimant said, "f - - - you, John."

Use of vulgar and profane language by employees in the receiving area was a common, everyday occurrence. The manager himself had engaged in using vulgar and profane language, including recently having called an employee a "f - - - ing idiot" to his face. The claimant had not been given any prior warnings regarding the use of vulgar or profane language, and he had not received any discipline for any other types of issues for at least a couple years. However, because of the claimant's statement to the manager on November 16, the employer determined to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the employer can withdraw its protest to the claimant's claim for unemployment insurance benefits at the point of the hearing on the claimant's appeal. The employer does not have the right to withdraw a timely protest. Claimants are not automatically qualified in the absence of a protest. *Kehde v. Iowa Division of Job Service*, 318 N.W.2d 202 (Iowa 1982). The employer's attempted withdrawal of the protest is ineffective. However, the employer certainly can and did choose not to participate in and provide information for consideration in the hearing on the claimant's appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his use of vulgar language toward his manager. The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). However, this is not an automatic conclusion, but is subject to consideration of the surrounding situational facts. *Id*. Here, the claimant was understandably aggravated by his manager who refused to address the claimant's issue, and the claimant responded by using language common in that setting. While in no way exemplary, under the circumstances of this case, the claimant's choice of language toward his manager was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 29, 2011 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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