

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER L MILTNER
Claimant

APPEAL NO. 13A-UI-13576-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

YELLOWBOOK INC
Employer

OC: 11/17/13
Claimant: Respondent (1R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated December 6, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on January 29, 2014, by telephone conference call. The claimant participated personally. The employer participated by Christy Dalecky, Senior Human Resources Manager; Justin Linnell, Market Manager; Traci Mueller, Market Manager; and Debbie Eggleton, Claims Representative. The record consists of the testimony of Christy Dalecky; the testimony of Justin Linnell; the testimony of Traci Mueller; the testimony of Jennifer Miltner; the testimony of Debbie Eggleton; and Employer's Exhibits 1-2.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a digital marketing company that provides services to small businesses. The claimant was hired on April 9, 2007, as a telephone account support consultant. She was a full-time employee. Her last day of work was November 18, 2013. She was terminated on November 18, 2013.

The incident that led to the claimant's termination occurred on November 15, 2013. The claimant was at a sales meeting. Someone who was at that meeting reported to Justin Linnell, Market Manager, that the claimant used profane language and made vulgar hand gestures at the meeting. Mr. Linnell in turn notified Christy Dalecky, Senior Human Relations Manager. An investigation was conducted and the employer felt that the allegations were founded. A meeting was held with the claimant on November 18, 2013. The claimant was informed of the allegations and told that she was being terminated as a result.

The claimant admitted that she did use the phrase “suck a cock” but denied saying fuck you and fuck that. She also denied making the hand gestures. The phrase “suck a cock” was meant as a joke. There was a running joke going through the employer about this phrase because it was used in a birthday card to the claimant and everyone thought it was funny. The claimant had been previously warned about using professional language but she was never disciplined for the use of profanity.

None of the individuals who heard the claimant’s comments or saw the hand gestures testified at the hearing even though they still work for the employer.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker’s duty to the employer. Profanity or other offensive language in a confrontational 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. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The employer provided insufficient evidence to show misconduct. The claimant was terminated for using profane language and making vulgar hand gestures at a meeting. The claimant denied this allegation, with the exception of one phrase –“suck a cock.” The use of this phrase was a running joke among employees and the claimant had no idea it was offensive. The employees who heard the other profanity and saw the hand gestures did not testify at the hearing even though they are still employed by the employer. The employer’s evidence that the claimant did these things is hearsay.

While hearsay is admissible in administrative hearings, it has limited value in proving misconduct. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Since the first-hand witnesses did not testify at the hearing, the administrative law judge has no ability to weigh the credibility of the claimant’s testimony against the testimony of other first-hand witnesses. The use of a single vulgar phrase is not enough to constitute misconduct. It rather represents poor judgment on the part of the claimant. There is no history of the claimant’s use of vulgar language in the workplace. Since the employer has failed to provide sufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

The administrative law judge, when reviewing the agency records, noted that the claimant has been disqualified due to misconduct. The representative’s decision allowed benefits. This matter is therefore remanded to the Claims Section for further investigation on why benefits have been withheld thus far.

DECISION:

The decision of the representative dated December 6, 2013, reference 01, is affirmed. Unemployment insurance benefits are allowed if the claimant is otherwise eligible. This matter is remanded to the Claims Section for further investigation on why the claimant is disqualified from receiving benefits.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css