

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SONIA R CARTER
Claimant

UNIVERSITY OF NORTHERN IOWA
Employer

APPEAL 17A-UI-05925-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/14/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 6, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for using profane language on the job. The parties were properly notified of the hearing. A telephone hearing was held on June 27, 2017. The claimant, Sonia R. Carter, participated. The employer, University of Northern Iowa, participated through Brian Hadley, Assistant Director of Campus Services; Mike Zwanziger, Director of Physical Plant; and Michelle Byers, Director of Human Resources. Employer's Exhibits A through M were received and admitted into the record without objection.

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, most recently as a Custodian I, from February 2002 until May 19, 2017, when she was discharged. On May 9, 2017, claimant had a telephone conversation with Ricky Thomas, her supervisor. Thomas told claimant that she needed to send Bobbi, the student employee who was working with her, to another building so she could work on another project. The employer testified that claimant became agitated and used profanity toward Thomas while objecting to this request. Thomas wrote a statement on the date of the incident, reporting that claimant used the F-word multiple times, described the situation as "some bulls***," and said she was not going to train a "f***ing new student." (Exhibit B) Tim Divine, an employee who was in Thomas' presence while he was speaking to claimant, reported hearing profanity coming from claimant. (Exhibit D) Russ Myers, another employee in the room at the time, recalled Thomas holding the phone away from his ear and asking claimant to calm down. (Exhibit E) The employer also provided Hadley's notes from his conversations with Thomas, claimant, and others during the investigation. During his conversation with claimant on May 9, she said it was possible that she said "f*** this s***". (Exhibit A) She also expressed frustration with Thomas' tendency to laugh in uncomfortable or confrontational situations, and she stated that perhaps she deals with uncomfortable situations by using profanity.

Claimant testified that she was hollering and talking loud while on the phone to Thomas, but she does not believe she was “hollering real loud.” She also does not think she said the F-word, as she underwent counseling back in 2015 for her language. She testified that there is a possibility that she used profanity and forgot about it. Claimant was disciplined in the past for using profanity at work. On January 20, 2015, claimant received a disciplinary action involving a five-day suspension and three mandatory counseling sessions for inappropriate behavior and violating the employer’s Discrimination, Harassment and Sexual Misconduct Policy. (Exhibit K) She was instructed at that time that she must cease using profane language at work in order to retain her employment.

Both claimant and Pearson testified about others using profanity at work. Claimant testified that coworker Becky swore at Thomas the summer before to the point that Thomas was afraid of Becky. It is not clear whether Thomas reported that incident to any upper-level management. Pearson testified that she once heard Thomas and Myers talking in the custodial office and heard Thomas say, “Oh s***.” Pearson did not report this to management.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). "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 or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

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.*

Here, the employer provided written statements from multiple witnesses to the events of May 9. It also provided Hadley, who conducted the investigation interviews and spoke with all parties involved in the incident. The witness statements, with the exception of Divine's statement, are consistent and also comport with Hadley's notes from the May 9 interviews with claimant and Thomas. Claimant herself does not clearly recall the conversation. She admits that she was upset with Thomas, and she admits there is a possibility she swore and does not remember it. 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 employer has provided the more credible version of events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Even if other employees have used profanity at work, there is no indication that management was made aware of those incidents or given an opportunity to enforce its expectation of a profanity-free workplace. The employer has presented substantial and credible evidence that claimant used profanity multiple times while yelling at Thomas, her supervisor, after being warned about her language in the past. This is disqualifying misconduct, and benefits are withheld.

DECISION:

The June 6, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn