IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHAWN D DEJONGE
Claimant

PARCO LTD
WENDY'S OLD FASHIONED HAMBURGERS
Employer

APPEAL NO. 07A-UI-08690-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/07 R: 04
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Shawn D. DeJonge (claimant) appealed a representative's September 13, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 26, 2007. The claimant participated in the hearing and presented testimony from one other witness, Mertina McClellon. Mark McGowan appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 16, 2006. He worked part time (30 – 40 hours per week) as a crew member at the employer's Burlington, Iowa, restaurant. His last day of work was August 9, 2007. The employer confirmed his discharge on August 13, 2007. The reason asserted for the discharge was allegedly being threatening, abusive, and insubordinate against a manager.

On the night of August 9 near closing time the claimant was drying the floor after the mopping when the manager on duty asked him to clean out the reach-in cooler. The claimant responded by asking why Scott, another employee on duty, who would normally have that task, did not have to do the task. He further stated that he was sick of the manager asking him to do other people's jobs, saying that "this is "b - - - s - - -." The manager became irritated and used some vulgar language to the claimant including the "f-word." The claimant further responded with comments about the manager showing favoritism toward certain other employees, and may have repeated that he thought this was "f - - -ing b - - - s - - -." The manager then told the claimant that he was fired and should leave. After briefly further arguing with the manager as to whether she had the right to fire him, the claimant left, and as he left called her a "b - - - -."

On August 10, the claimant and his girlfriend, Ms. McClellon, who was also an employee and who also had been working on the night of August 9, met with the general manager. The general manager indicated he would like to bring the claimant back to work, but that he needed to see what the district manager, Mr. McGowan, had to say, so the claimant should stay off work and check back later. On August 13, the employer informed the claimant that his employment was indeed terminated.

The employer asserted through second-hand testimony that the claimant had used significantly more and worse language toward the manager before she sent him home and that he had been waiving his fist in the air toward the manager. The claimant and Ms. McClellon testified that the claimant did not use the "f-word" until after the manager had said it to him, and that he had not used other language or called her vulgar names other than calling her a "b - - - -" after she told him he was fired and that he was to leave. They further testified that at one point the manager had been pointing her finger at the claimant and saying, "What are you going to do about it, hit me?" during which time the claimant had his hands up at his sides open-fisted.

REASONING AND CONCLUSIONS OF LAW:

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).

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.

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.

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his alleged threatening, verbally abusive, and insubordinate conduct toward the manager. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that while the claimant used some language, for the most part it was after the manager used vulgar language to him, that his language was not the degree of language which was asserted by the employer, and that he was not being threatening. No first-hand witness was available at the hearing on behalf of the employer to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the manager and other employee; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether they are credible in comparison to the first-hand testimony of the claimant and his witness. Under the circumstances of this case, the administrative law judge concludes that the first-hand testimony is more credible.

The employer asserted but did not establish that the claimant had been previously verbally counseled regarding times where the claimant left work early because of being upset. Further, there is no evidence there had been any prior incidents or warnings regarding using vulgar language at work. While the claimant did use the "b - - - s - - -" phrase prior to the manager escalating the matter, under the circumstances of this case, the claimant's conduct 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, as compared to intentional, substantial, or repeated misbehavior. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). 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 September 13, 2007 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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