IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DENNIS E OBREGON Claimant **DELAVAN INC** Employer	**APPEAL 16A-UI-06728-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/01/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the June 6, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 2, 2016. Claimant participated. Employer participated through senior human resources generalist Amanda White and team coordinator Craig Stephenson.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an assembler from August 25, 2015, and was separated from employment on March 29, 2016, when he was discharged.

Claimant was discharged for engaging in harassing behavior with a coworker. The employer has a code of ethics policy, which prohibits discrimination and harassment in the workplace. Claimant was aware of the policy. Profanity is used at the employer by employees sometimes. The employer requests employees to not use profanity; however, employees do use profanity in a joking manner. The employer may discipline employees for using profanity; it depends on how the person receiving the profanity perceives it. Claimant testified his coworker, Tang, used profanity on a daily basis. Claimant testified Tang would regularly state to claimant, "Get your [f@#king] ass over here." Claimant testified he did not believe other employees were disciplined for using profanity.

On March 4, 2016, claimant was working his scheduled shift when he asked Tang to come over and stamp his parts. Claimant did not use profanity at Tang. Claimant testified Tang responded to claimant, "I ain't [f@#king] doing your parts." Tang was frustrated because she was behind on her work and she was training another employee. Tang and claimant had a playful relationship. Sometimes they would go too far with the playfulness. Claimant did not say "[f@#king liar]" to Tang on March 4, 2016.

On March 7, 2016, the employer received a report that Tang appeared scared of claimant. The employer investigated the incident. The employer interviewed Tang and two witnesses to the incident on March 4, 2016. Ms. White testified that the witnesses confirmed Tang's story that claimant called her "[f@#king liar]" multiple times. Ms. White testified that during the investigation, other employees reported that there was an ongoing issue between Tang and claimant. Tang did not testify at the hearing and the witnesses with first-hand knowledge to any of the alleged incidents between claimant and Tang did not testify at the hearing. Claimant had reported to Mr. Stephenson that another employee was saying racist things. Claimant testified this employee was one of the employees that told the employer he used profanity at Tang.

On March 14, 2016, claimant reported for work and was pulled into the office. The employer told claimant that there was a problem. Claimant was not aware there was a problem. Claimant denied saying "[f@#king liar]" to Tang. The employer stated that there was a witness that did not like the way claimant was talking to Tang. The employer told claimant he was suspended and that the employer was going to investigate. Claimant was suspended with pay. Claimant was then discharged on March 29, 2016.

On December 10, 2015, the employer gave claimant a verbal warning for an incident between claimant and Mr. Stephenson. Mr. Stephenson then explained the employer's expectations to claimant. Claimant was allowed to go back to work. Claimant was warned his job was in jeopardy. On January 17, 2016, the employer gave claimant a verbal warning because claimant was upset and being loud on the shop floor.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to

see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that claimant's recollection of the events is more credible than that of the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

"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).

If the employer wishes to have its employees treat each other with respect, it must enforce respectful treatment amongst coworkers and apply those expectations consistently throughout the chain of command. Claimant presented direct, first-hand testimony, that he had a playful

relationship with his coworker, Tang. This testimony was corroborated by Mr. Stephenson's testimony that claimant and Tang had joked around in the past. Claimant also presented direct, first-hand testimony that on March 4, 2016, he did not say to Tang, "[f@#king liar]". The employer did not rebut claimant's testimony with any witness(es) with direct, first-hand knowledge. Although the employer may have a policy of keeping witnesses confidential, it still 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 employer failed to provide sufficient evidence that on March 4, 2016, claimant used profanity towards a coworker. Benefits are allowed.

Furthermore, claimant presented direct, first-hand testimony that Tang would say to him, "Get your [f@#king] ass over here" on almost a daily basis. Claimant also testified that profanity was common place among the employees at the employer in conversation and in a joking manner. Claimant testified the other employees were not disciplined for using profanity. Even if claimant stated "[f@#king liar]" to a coworker, since his consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The June 6, 2016, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs