

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JANICE M NERLY
Claimant

OVATIONS FOOD SERVICES LP
Employer

APPEAL 19A-UI-02931-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/24/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 29, 2019, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for engaging in conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephonic hearing was held on April 26, 2019. The claimant, Janice M. Nerly, participated. The employer, Ovations Food Services, L.P., participated through witness Megan Sease, HR Manager; and Jackie Boudreaux of ADP/Talx/Equifax represented the employer. Employer's Exhibits 1 through 4 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 part-time, most recently as a banquet server, from November 2, 2017, until February 20, 2019, when she was discharged. On February 17, 2019, claimant approached two co-workers who were discussing their children's fathers. Claimant commented that she knew one thing for certain: there was a difference between a black man and a n-word.¹ Claimant's co-workers became upset by this and no longer wished to speak to her. Claimant tried to apologize to her co-workers, but they did not want to talk to her. The co-workers reported this incident to management, and claimant was sent home.

Claimant reported to work the following day and was immediately suspended pending an investigation. Sease spoke with one of the co-workers, a biracial individual who found claimant's comment offensive and who did not want to work with claimant any longer. During this investigation, claimant consistently admitted that she made the offensive remark in question. On February 20, the employer discharged claimant for using the n-word at work.

¹ Claimant used the full word on this occasion.

Claimant described an incident several weeks prior to her discharge during which a co-worker called her “a cranky old white bitch.” This employee was not a fellow employee of this employer, but rather, he was an employee of a temporary staffing firm that was assigned to work with claimant. Sease learned about this incident several weeks after it happened, and she immediately sent that employee home and instructed the staffing agency to not allow the employee to return.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related 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. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment.” *Myers v. Emp’t Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). Vulgar language in front of customers can constitute misconduct, *Zeches v. Iowa Dep’t of Job Serv.*, 333 N.W.2d 735, 736 (Iowa Ct. App. 1983), as well as vulgarities accompanied with a refusal to obey supervisors. *Warrell v. Iowa Dep’t of Job Serv.*, 356 N.W.2d 587, 589 (Iowa Ct. App. 1984). Likewise, the repetition of vulgarities can elevate a minor peccadillo to an act of willful misconduct. *Carpenter v. Iowa Dep’t of Job Serv.*, 401 N.W.2d 242, 245-46 (Iowa Ct. App. 1986).

The employer has established that claimant engaged in disqualifying misconduct by using the n-word in a conversation with her co-workers. This word is laden with negative meaning and is blatantly offensive, regardless of the audience to which it is directed or the context in which it is used. Claimant admits that she used this word in the workplace. While claimant's attempts to apologize are noted, these do not excuse her conduct. There is no evidence in the record showing similarly offensive conduct was actually treated less severely. The employer has met its burden of proving that claimant was discharged for disqualifying misconduct. Benefits are withheld.

DECISION:

The March 29, 2019, (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