

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHELLEY R LANDALS**

Claimant

**APPEAL NO: 18A-UI-05328-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ROWLEY MEMORIAL MASONIC HOME**

Employer

**OC: 04/01/18**

**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/appellant, Rowley Memorial Masonic Home, filed an appeal from the April 30, 2018 (reference 02) unemployment insurance decision that allowed benefits. After due notice, a telephone hearing was held on May 25, 2018. The claimant participated personally. The employer participated through Kate Klimesh. No request for postponement was made by either party.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**NOTE TO EMPLOYER:**

If you wish to change the address of record, please access your account at: <https://www.myiowauui.org/UITIPTaxWeb/>.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

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

Can any 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: The claimant was employed full-time as a dietary aide beginning January 15, 2018 and was separated from employment on March 29, 2018, when she was discharged.

When the claimant was hired, she was trained on employer policies which prohibit workplace violence, threats and bullying. The employer also expects employees to be respectful and use professional language. The claimant had no warnings before discharge.

The employer reported on March 28, 2018, the claimant engaged in threatening conduct and violated the employer's workplace violence policy. This was based upon the claimant being upset about breakfast drinks and staff during the breakfast shift, reportedly "throwing dishes" by way of plastic cups and bowls into the sink she was using, and reportedly yelling and threatening several co-workers. Ms. Klimesh could not furnish any details of the three incidents, except that the claimant reportedly used the "f" word when yelling at co-workers. Ms. Klimesh was the sole employer witness for the hearing. She did not witness or investigate any of the three incidents referenced in the claimant's reasons for discharge. The claimant's immediate supervisor was present during some of the incidents but did not attend the hearing due to an appointment. No written statement was provided and no request for postponement was made to allow for his participation. No employee or witness to the claimant's conduct on March 28, 2018 attended the hearing.

The claimant stated March 28, 2018 was an "overall crappy day" for several reasons and conceded she was upset and frustrated throughout the day. She referenced the roll out of a new procedure related to dining services as contributing to her frustrations, as well as her peers. The claimant stated she had gone into her manager's office after the breakfast shift and complained about the evening co-workers not doing their jobs correctly. She denied use of profanity or a raised voice. She did acknowledge she "took out her frustration on the dishes" while she worked the lunch shift but denied breaking or throwing any dishes while being frustrated. She further stated she had "talked loudly" but did not yell at co-workers or made any threats to her co-workers that afternoon, and that her co-worker had previously told her to shut up.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,085.00, since filing a claim with an effective date of April 1, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Ms. Klimesh denied receipt of the notice of fact-finding interview until after the scheduled interview. She also denied receiving a voicemail from a Workforce Advisor at the scheduled interview time.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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. 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

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.* Assessing the credibility of the claimant 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 the employer has not satisfied its burden to establish by a preponderance of the

evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. It is true that “[t]he 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). However, the claimant’s use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct. See *Nolan v. Emp’t Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfield, J., dissenting) (finding the matter to be an issue of fact “entrusted to the agency.”).

The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe or violent conduct in the workplace, in an era where violence in the workplace is real. However, the employer has failed to establish by a preponderance of the evidence that the claimant’s actions on March 28, 2018 violated the employer’s violence or threats policy. The employer and claimant accounts of the separation are inconsistent: The claimant stated she had an “overall crappy day” on March 28, 2018, which included her venting to her manager, talking loudly to a co-worker who told her to shut up, and getting mad while she was cleaning dishes. There was no evidence that the claimant used profane, vulgar or threatening language, or that her frustrated conduct was in any way violent or threatening, or directed at any person. No evidence was provided that the claimant’s frustration was visible to residents or guests on the premises. The employer witness could not provide any detail or explanation of the final incident which triggered discharge. No details of any alleged prior incident or prior warning were provided. No manager or witness to the claimant’s discharge attended the hearing, and no request for continuance was made to allow for their participation. No video footage or surveillance was furnished by the employer which would corroborate its reason for discharge. The employer presented no evidence to refute the claimant’s credible account in which she credibly denied use of threatening, profane or violent language or conduct.

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.

In this case, the employer has failed to provide any details related to a final incident which led to the claimant discharge. Accordingly, the employer has not established by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant’s discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden

of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges for the employer are moot.

**DECISION:**

The April 30, 2018, (reference 02) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld shall be paid, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn