IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KIMBERLY L FREDRICKSON Claimant **CARGILL INCORPORATED** Employer	**APPEAL 21A-UI-05553-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/06/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Kimberly L Fredrickson, the claimant/appellant, filed an appeal from the February 9, 2021, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 26, 2021. Ms. Fredrickson participated and testified. Frank Jenkins, Ms. Fredrickson's representative also participated. The employer participated through Dana Spree, employment relations specialist, Rebecca Schneckloth, scale operator, Jeff Gross, plant manager and Tom Kiuper, hearing representative.

ISSUE:

Was Ms. Fredrickson discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Fredrickson began working for the employer on October 31, 2014. She worked as a customer service/operations grader. Profanity was used frequently in the workplace. Ms. Fredrickson's employment was terminated on December 7, 2020.

One day during the week of November 9-13, 2020, Ms. Fredrickson was in the grading room with other employees. An employee handed Ms. Fredrickson two tickets. The tickets were inaccurate. Ms. Fredrickson told the employee that he had made a mistake and that his mistake negatively impacted her job. Ms. Fredrickson was assertive but she did not yell. During the conversation Ms. Fredrickson told the employee "You are fucking stupid and should not be allowed here." Ms. Schneckloth personally witnessed the incident and testified that she heard Ms. Fredrickson curse at the employee. The employee reported the incident to his manager. Another employee also reported the incident to the employer. Ms. Fredrickson testified that she as far as she remembers she did not use profanity. Mr. Gross was not at work on the day of the incident. Mr. Gross returned to work and on November 30, 2020 the incident was brought to his attention. Ms. Fredrickson was suspended that day pending an investigation.

Human resources staff spoke with Ms. Fredrickson about the incident. The employer also spoke with the other employee and the witnesses. The witnesses, including Ms. Schneckloth, confirmed that Ms. Fredrickson had cursed at the employee.

Ms. Fredrickson was issued a warning in August 2020 for an incident in which contractors came into office and Ms. Fredrickson became "aggressive" in her communication with them. The employer did not provide details on what it meant by saying that Ms. Frederickson became "aggressive." Ms. Fredrickson was issued a warning in September 2020 regarding her interactions with a delivery driver. Ms. Fredrickson has used profanity in that interaction, although she did not direct the profanity at the delivery driver. Mr. Gross had multiple verbal coaching sessions with Ms. Fredrickson about how she interacted with other employees and others.

On December 7, 2020 the employer called Ms. Fredrickson and told her that her employment was terminated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Fredrickson was discharged from employment due to job-related misconduct.

Iowa Code section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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).

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.

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.

An employer has the right to expect decency and civility from its employees. "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). 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 (Mansfiled, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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*.

The findings of fact show how the administrative law has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience.

In this case, Ms. Fredrickson had been previously warned about using profanity in the workplace. Despite this, Ms. Fredrickson used profanity again in the workplace and directed it at another employee. Ms. Olmstead's use of profanity was confrontational, disrespectful and name-calling. To be clear, Ms. Fredrickson being assertive is not misconduct. Also, Ms. Fredrickson being "aggressive" in conversation, without any details about what that means, is not misconduct. Women in the workplace are often penalized for behavior that if done by male employees would be deemed accepted. Here, however, Ms. Fredrickson's employment was not terminated because she was being assertive or "aggressive" but because she directed profanity at a co-worker in a confrontational, disrespectful and name-calling manner. This is misconduct and benefits are denied.

DECISION:

The February 9, 2021, (reference 01) unemployment insurance decision is affirmed. Ms. Fredrickson was discharged from employment for 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.

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Daniel Zeno
Administrative Law Judge
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April 30, 2021
Decision Dated and Mailed

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