IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMBER BERGER Claimant **CUSTOM-PAK INC – LP2** Employer	**APPEAL 16A-UI-08884-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/24/16** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 11, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on August 31, 2016. The claimant, Amber Berger, participated. The employer, Custom-Pak, Inc. – LP2, participated through Ron Zimmer, VP And GM of the Dewitt facility; and Vicki Rixen, HR coordinator. Claimant's Exhibits A through G and Employer's Exhibits 1 through 3 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 full time, most recently as a manufacturing team member, from October 13, 2014, until July 26, 2016, when she was discharged.

On July 20, 2016, while claimant was on her unpaid lunch break, she posted a derogatory comment on Facebook about a coworker. Specifically, claimant referred to her coworker as a "black lazy fat girl" who allegedly "can't" run a machine and does not do her work. In contrast, claimant posted that she was required to operate a machine that caused her severe contractions. Claimant closed her posting with, "I'm confused on how this 'white privilege' shit works." Rixen testified that multiple employees brought this Facebook post to the employer's attention that day. The employer maintains a zero-tolerance policy regarding harassment in the work environment. The employer also has a social media policy.

Once the employer learned about claimant's Facebook post, claimant was contacted, told that the employer had concerns about the post, and instructed to stay home while the employer determined how to handle the situation. Ultimately, the employer discharged claimant.

Claimant received a suspension on December 10, 2014, after she used the employer's intercom system to make an inappropriate genitalia-referencing comment to a coworker.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

Here, claimant made a racially offensive comment on Facebook while on her lunch break from work. While the fact that the comment was made on claimant's lunch break does not itself render her conduct work-connected, she clearly referenced a coworker and is evidently connected on the social media site with other coworkers, as coworkers reported claimant's conduct to the employer. This establishes a sufficient nexus to the workplace. Claimant's Facebook comment disrupted the work environment, which harms the employer's interest. Claimant's comment violated the employer's expectation that she participate in the harassment-free work environment and respect her coworkers. While Facebook is not an automatic extension of the work environment, an employee may not engage in harassing conduct toward a coworker on the site while on lunch and not expect consequences for her conduct to seep into her physical work environment. Claimant's reference to her Facebook comment as a "joke" is an unconvincing mischaracterization. The employer has established that claimant was discharged for disqualifying, work-related misconduct. Benefits are withheld.

DECISION:

The August 11, 2016, (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.

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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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