

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**THOMAS J WILGENBUSCH**  
Claimant

**EMC ACQUISITIONS INC**  
Employer

**APPEAL 19A-UI-08398-AW-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 09/29/19**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Claimant filed an appeal from the October 23, 2019 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on November 18, 2019, at 9:00 a.m. Claimant participated. Employer participated through Jason Dunbar, Plant Manager. Claimant's Exhibit A was admitted.

**ISSUE:**

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time machine operator from October 27, 1993 until his employment with EMC Acquisitions, Inc. ended on September 26, 2019. (Dunbar Testimony)

Employer has a policy prohibiting the use of foul or abusive language. (Dunbar Testimony) The policy is outlined in the employee handbook. (Dunbar Testimony) Per the policy, a first offense is punishable by a three-day suspension and a second offense is punishable by immediate discharge. (Dunbar Testimony) Claimant received a copy of the handbook. (Dunbar Testimony)

On January 20, 2014, claimant used profanity during an argument with the general manager. (Claimant Testimony) Claimant's actions violated employer's policy against foul or abusive language. (Dunbar Testimony) Claimant was issued a written warning and suspended for three days. (Claimant Testimony) The warning stated that another event would result in termination. (Dunbar Testimony)

On September 21, 2019, claimant argued with a coworker. (Dunbar Testimony) During the argument both claimant and coworker used profanity in raised voices. (Claimant Testimony) The argument was heard by multiple employees. (Dunbar Testimony) Following the argument, the coworker submitted a harassment form. (Dunbar Testimony) Employer investigated the incident by interviewing claimant and all witnesses. (Dunbar Testimony) On September 26, 2019, employer discharged claimant for a second violation of the employer's policy prohibiting

foul or abusive language. (Dunbar Testimony) The coworker was disciplined with a three-day suspension as it was his first offense. (Dunbar Testimony)

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

For the reasons that follow, the administrative law judge concludes claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

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 cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

“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).

Claimant used profanity during a confrontation with a coworker after receiving a prior warning for using foul or abusive language. Claimant’s actions were a deliberate violation or disregard of standards of behavior employer had a right to expect of claimant. Claimant was discharged for a current act of disqualifying work-related misconduct. Benefits are denied.

**DECISION:**

The October 23, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Decision Dated and Mailed

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