

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSPEH P MOONEY
Claimant

APPEAL NO. 10A-UI-01271-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 08/10/08
Claimant: Respondent (2-R)

Section 96.5-2-a – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated January 14, 2010, reference 04, which held the claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 24, 2010, in Davenport, Iowa. The claimant participated. The claimant was represented by Erin Dooley, attorney at law. The employer participated by Maria Dozaan, human resources manager, and Trevor Fuhlman, second shift maintenance supervisor. The employer was represented by Danny Cornell, attorney at law. The record consists of the testimony of Maria Dozaan; the testimony of Trevor Fuhlman; the testimony of Joseph Mooney; Claimant's Exhibits A through D: and Employer's Exhibits 1 through 3.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a meat processing facility located in West Liberty, Iowa. The claimant was hired on September 15, 2008, as a maintenance mechanic in the "Ready to Eat" section. He was a full time employee. His last day of work was December 15, 2009. He was terminated on December 22, 2009. During the period of time between the last day worked and his termination, the claimant was on suspension pending an investigation of an incident that took place on December 15, 2009.

The incident that led to the claimant's termination took place on December 15, 2009. One of the maintenance supervisors, and therefore one of the claimant's supervisors, was another employee named Trevor Fuhlman. The claimant and Mr. Fuhlman had previously worked

together and there was a personality conflict between them. The claimant felt that Mr. Fuhlman was rude and did not treat him and other employees well. The claimant made some complaints about Mr. Fuhlman to management, but Mr. Fuhlman was unaware of any problems between him and the claimant. When Mr. Fuhlman was promoted to maintenance supervisor on second shift, he and the claimant would have less contact, since the claimant worked the day shift. The overlap was only about four hours. The claimant did his best to avoid any contact with Mr. Fuhlman.

On December 15, 2009, there was a problem on Line 3 with the sealing mechanism. This line was the responsibility of another employee named Eli Kincaid. The claimant was part of the group trying to solve the problem, which the claimant felt was due to Mr. Kincaid's failure to do the necessary preventive maintenance. Mr. Fuhlman was asked to assist. An argument ensued between Mr. Fuhlman and the claimant, during which the claimant used the work "fucking" at least twice, including the claimant asking Mr. Fuhlman "Do you want to fucking do it yourself?" Mr. Fuhlman asked the claimant to step into the office and the claimant became loud, red-faced and his hands were moving. He told Mr. Fuhlman that "you are fucking belittling me." Mr. Fuhlman suggested that the matter be discussed with human resources, but since it was the end of the shift, no one was available. Mr. Fuhlman discussed the matter with his supervisor and he was instructed to send the claimant home.

An investigation was conducted by human resources and the witnesses confirmed that it was the claimant who used the expletives. The employer has a written policy that lists major rule violations, which will lead to termination without warning. These major rule violations include the use of abusive or threatening language or gesture toward others. (Employer's Exhibit 1)

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1985), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

After carefully considering all of the evidence and weighing the credulity of the testimony, the administrative law judge concludes that the employer has established misconduct. The claimant used profane and vulgar language at least three times. He made reference to the work of co-employees' work in a derogatory manner and then used that same word, "fucking," when talking to Mr. Fuhlman. The claimant was obviously frustrated over a situation at work, but he responded by using vulgar language and confronting a supervisor in a disrespectful manner. This is a violation of the employer's written work rules and is a breach of the duty of decency and civility owed by the claimant to his employer. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits,

as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The representative's decision dated January 14, 2010, reference 04, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw