

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

WILLARD M RHOADES
Claimant

WINNEBAGO TRIBE OF NEBRASKA
Employer

APPEAL 19A-UI-00634-AW-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/23/18
Claimant: Appellant (1)

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Willard Rhoades, Claimant, filed an appeal from the January 14, 2019 (reference 01) unemployment insurance decision that denied benefits because he was discharged from work with Winnebago Tribe of Nebraska due to insubordination. The parties were properly notified of the hearing. A telephone hearing was held on February 7, 2019 at 9:00 a.m. Claimant participated. Employer participated through Susie Taylor, Human Resources Manager, and Maggie Riner, Food and Beverage Supervisor. No exhibits were 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 full-time, most recently as a cook, until his employment with Winnebago Tribe of Nebraska ended on December 24, 2018. (Claimant Testimony)

Employer has a policy prohibiting profanity and discourtesy to supervisors. (Taylor Testimony) The policy is included in the employee handbook. (Taylor Testimony) Claimant received a copy of the handbook during orientation. (Taylor Testimony)

On September 15, 2018, claimant had a verbal altercation with his supervisor during which he raised his voice and used profanity. (Claimant Testimony) This occurred on the casino floor in the presence of a coworker and customers. (Riner Testimony) Claimant was given a warning that any future incidents may result in further discipline up to and including termination. (Claimant Testimony) Claimant signed and received a copy of the warning. (Taylor Testimony)

On December 17, 2018, claimant told his supervisor to tell the food and beverage director to take the till and "shove it up his ass." (Claimant Testimony) This occurred while claimant was off-the-clock but at the employer's place of business and in the presence of two coworkers. (Claimant Testimony) Claimant clocked-in and began his shift, but was sent home for the day

shortly thereafter. (Claimant Testimony) Employer initiated an investigation by taking statements and reviewing surveillance. (Taylor Testimony) During employer's investigation, claimant continued to work for employer. (Taylor Testimony) Claimant was not told that the matter was being investigated and may lead to his discharge. (Taylor Testimony) On December 24, 2018, claimant was discharged from employment for insubordination based on claimant's comments to his supervisor on December 17, 2018. (Taylor Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharge for disqualifying, work-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(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.

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).

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.

Claimant's use of profanity in a confrontational and disrespectful manner towards his supervisor and in the presence of coworkers is misconduct. The question, then, is whether claimant's misconduct is work-related. Claimant made the comments at his workplace, directed them towards his supervisor and said them in the presence of coworkers. Claimant's comments have a nexus with his work. Employer has an interest in maintaining a professional work environment wherein employees treat each other and their supervisors with respect. The harm of claimant's comments is that coworkers who observed the disrespectful, profane and confrontational comments made by claimant towards his supervisor could believe that type of conduct is permissible. Claimant's comments not only violated the employer's policy, but also violated the code of behavior that is impliedly contracted between employer and employee. Claimant knew or should have known that his comments would negatively impact employer's interests.

Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The January 14, 2019 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs