

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRENDA MCGRANE
Claimant

CATHOLIC HEALTH INITIATIVES – IOWA
Employer

APPEAL 19A-UI-03433-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/17/19
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 15, 2019, (reference 02) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish the discharge was for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held on May 31, 2019. The claimant, Brenda McGrane, participated. The employer, Catholic Health Initiatives – Iowa, participated through witnesses Andy Jennings, Human Resources Business Partner; Mong Hsu, Supervisor; Teri Reiff, Director of Laboratory Services; Cristin Lantz, Manager; and Lesley Buhler of Talx/Equifax represented the employer and testified regarding the fact-finding interview. Employer’s Exhibits 1 through 5 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer’s account be waived?

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 cytotechnologist, from January 25, 2007, until March 1, 2019, when she was discharged.

Toward the end of her employment, claimant got a new employment badge and began experiencing difficulty using the new badge to punch in at work. On February 25, 2019, Mong “Dreem” Hsu, claimant’s supervisor, emailed claimant and asked her to explain a reason for her multiple missed punches and an action plan to eliminate the issue. (Exhibit 3) The following day, Hsu overheard claimant expressing frustration about this task to a co-worker. Hsu asked

claimant to come to her office so they could discuss the problem and Hsu could try and explain things to her.

Claimant followed Hsu to her office and slammed the door behind them. She then said in a raised tone, "What do you want me to do? I clock in every day like a normal fucking human being." Claimant made statements similar to this throughout the meeting. She said she had gone to Public Safety but they could not fix her issue, so she was going to engineer a solution and fix it herself. Hsu replied that Public Safety was the proper resource to look to and told claimant that moving forward, it was up to her to make sure she was punching in correctly in the morning. Claimant then slammed down the slide holder she was holding and said, "It's me against the fucking machine." When Hsu pointed out an issue with the times claimant had recorded on the edit log, claimant poked at Hsu's clipboard and said, "I'm busy as shit... What do you want me to do?" Claimant also threw a pen at the computer. During the meeting, Hsu noticed that claimant was so upset her hands were shaking.

While this meeting was occurring, Lantz and other staff could hear the altercation from down the hall. Lantz attempted to knock on Hsu's door and then open it to try and intervene. After Lantz knocked, claimant opened the door, yelled that they were having a conversation, and then slammed the door on Lantz. At that point, Lantz called Reiff to come down from the floor above and assist.

Reiff came to Hsu's office to de-escalate the conflict. She attempted to enter the office, but the door was locked. She then knocked on the door and claimant let her in. Claimant was saying that if the employer did not appreciate her, she would just quit her employment. Reiff asked claimant to calm down, as she appeared visibly upset. Claimant continued yelling about not being appreciated. When claimant used profanity, Reiff told her that was unacceptable and that language would not be tolerated. Hsu, Reiff, and claimant all testified that at some point, claimant said, "If you don't believe me, you can kiss my ass." Eventually, claimant stated a final threat to quit her job and then walked out of the office and left for the day.

Following the meeting, Reiff asked Hsu and claimant to prepare statements describing the meeting. Claimant's statement was submitted to the employer on or about February 27, 2019. (Exhibits 3d and 3e) In her statement, claimant does not accept responsibility for her part in the altercation. She makes flippant and inappropriate comments in her statement, and her tone is confrontational. After receiving this statement and processing the incident from February 26, the employer determined that it should discharge claimant.

Claimant had received one prior warning for unprofessional communication and behavior. In mid-January 2019, one of the doctors pointed out an error that claimant made to her. After this interaction, while claimant was back with her co-workers, claimant commented that this was "bullshit." Hsu verbally coached claimant after this incident about appropriate work conduct.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,269.00, since filing a claim with an effective date of March 17, 2019, for the seven weeks ending May 4, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal. The employer submitted a brief written statement stating claimant was discharged for gross misconduct and it had no further information available. This written statement did not identify a rebuttal witness that could be contacted if necessary.

REASONING AND CONCLUSIONS OF LAW:

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

"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).

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer’s witnesses credible. Hsu, Lantz, and Reiff all gave detailed firsthand accounts of what happened on February 26, 2019.

In this case, the employer has established that claimant was discharged for disrespecting her supervisors and behaving inappropriately. Claimant’s language toward both Hsu and Reiff was hostile and rude, and it was coupled with angered finger-pointing and pen-throwing. When given the opportunity to take responsibility for her behavior, claimant refused to do so, instead doubling down with glib comments and a disrespectful tone. Claimant had been warned about inappropriate language in the past. Further, the administrative law judge believes that any reasonable employee would know that this sort of behavior is dischargeable misconduct even without a prior warning. Claimant violated the standards of conduct any employer reasonably has of its employees. The employer has met its burden of proving that claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer’s account will be charged. Iowa Code § 96.3(7)a-b, 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) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in [871—subrule 24.32\(7\)](#). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits she received and the employer's account shall be charged.

DECISION:

The April 15, 2019, (reference 02) unemployment insurance decision is reversed. 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,269.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn