IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NICHOLE L CONDOS Claimant **CITY OF INDIANOLA** Employer	**APPEAL 21R-UI-23718-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/21/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Nichole L. Condos, filed an appeal from the May 27, 2021 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits. A first telephone hearing was scheduled for August 10, 2021. Claimant did not appear and her appeal was dismissed. See 21A-UI-13397-DZ-T. Claimant successfully requested reopening to the Employment Appeal Board ("EAB"), who remanded the matter for a new hearing.

The parties were properly notified about the hearing. A telephone hearing was held on December 15, 2021. The claimant participated personally. The employer/respondent, City of Indianola, was represented by Elisha Brown. Employer witnesses included Chris DesPlanques and Chris Longer. Employer Exhibits 1-12 and Claimant Exhibit A were admitted into evidence. The administrative law judge took official notice of the administrative records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 began her employment on March 25, 2019 and worked as a full-time utility services representative until March 25, 2021 when she was discharged (Employer Exhibit 11-12).

Employer's attendance policy evaluates an employee's attendance infractions on a case-by-case basis. Employer expects employees to call, email or text message a supervisor prior to absence or tardy. Claimant was aware of these expectations.

On February 26, 2021 and March 2, 2021, claimant was late to work (Employer Exhibit 4). Employer informed claimant that she could not flex her time to make up for tardies or long lunches and must use "comp" time (Employer Exhibit 4). On March 9, 2021, claimant was

issued a verbal warning for matters related to cash drawer security. The verbal warning was not documented using employer's template (see Employer Exhibit 11-12) but Ms. Brown kept her own list of infractions (Employer Exhibit 4). This timeline/list was not shared with claimant during her employment.

On March 16, 2021, claimant was late again due to oversleeping (Employer Exhibit 4). On March 19, 2021, claimant was confronted by the employer about date errors on disconnect notices (Employer Exhibit 4). Again, this warning was not documented through the employer's template for discipline as used in the termination letter (Employer Exhibit 11-12).

On March 19, 2021, employer stated it presented claimant an "attendance warning letter" (Employer Exhibit 6) after claimant forgot to inform employer of a doctor's appointment in advance and was late to work. Unlike other correspondence with the claimant, the warning was not emailed to her, but reportedly brought to her desk. Claimant denied receipt of the warning, and noted her name was incorrectly spelled ("Condo" rather than "Condos") and she was not required to sign the warning. The employer did not utilize its warning template for this incident (Employer Exhibit 6).

On March 22, 2021, claimant was issued a "first notice" warning for attendance. The employer did utilize its established template and claimant signed the warning (Employer Exhibit 7). The claimant had no other attendance infractions thereafter.

On March 24, 2021, claimant was observed saying she didn't give a "fuck" anymore to a co-worker. The evidence is disputed as to whether other employees heard the comment (Claimant testimony, Employer Exhibit 10). The claimant did not say the curse word at management, or in front of customers. Employer concluded she was "insubordinate" in her actions. In light of having no prior warnings for similar incidents, or employer utilizing its progressive discipline policy, claimant was discharged on March 25, 2021. A review of the termination document reflects the final incident documented is the use of profanity (Employer Exhibit 11-12). Claimant stated at the termination meeting itself, employer informed her she was being discharged due to attendance and tardiness, but did also reference the profanity. Claimant asserted other employees also have used similar language in the workplace and not been discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was discharged but not for disqualifying job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa 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*. The administrative law judge carefully considered the evidence of both parties.

The administrative law judge questioned the validity of multiple "warnings" reportedly given to claimant inasmuch as the employer had a designated form for verbal and written discipline, yet failed to use it except on Monday, March 22, 2021 when claimant was issued a first warning for attendance. Other documentation citing to "warnings" were not received or shared with claimant during her employment. The administrative law judge also considered the fact that claimant worked for the employer for exactly two years and but the employer did not present any documented policy infractions until her final month of employment, when the employer concluded claimant was violating policies related to attendance, cash drawer handling, disconnect notices, and insubordination, all within a matter of a month. It cannot be ignored that the final incident for which claimant was discharged for happened only two days later after the first warning.

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant's evidence to be more credible than the employer, and that the employer has not satisfied its burden to establish by a

preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. At the hearing, employer opined claimant's discharge was based upon attendance and insubordination (through cursing). Claimant was issued a warning for attendance on March 22, 2021 and had no attendance infractions thereafter. Therefore, employer did not establish the claimant committed a final act of misconduct (for attendance) after prior warning.

The employer's discharge letter clearly states the final incident was claimant's use of profanity on March 24, 2021. The Iowa Court of Appeals has determined that "[t]he 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." *Myers v. Emp't Appeal Bd*., 462 N.W.2d 734 (Iowa Ct. App. 1990). 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 …." *Id*. at 738 (Iowa App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor's authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Id.; Deever v. Hawkeye Window Cleaning, Inc*., 447 N.W.2d 418, 421 (Iowa App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); Carpenter v. IDJS, 401 N.W.2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Services*, 333 N.W.2d 735 (Iowa App. 1983). In this case, claimant was discharged based upon her use of profanity in the presence of co-workers on March 24, 2021.

The administrative law judge does not condone the use of profanity in the workplace, but it cannot be ignored that her conduct was not coupled with other factors such as those listed above so egregious to warrant her immediate discharge. Claimant had no prior warnings for similar conduct, and had not been placed on any kind of final warning, for any infraction. Rather, claimant had been given a "first" warning only two days prior for unrelated conduct. Based on the evidence presented, the administrative law judge concludes the claimant's use of profanity on March 24, 2021 was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job-related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The unemployment insurance decision dated May 27, 2021, (reference 01) is REVERSED. The claimant was discharged but not for disqualifying job-related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge
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December 30, 2021
Decision Dated and Mailed

jlb/kmj