

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JON VOSS
Claimant

WHIRLPOOL CORPORATION
Employer

APPEAL 16A-UI-13828-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/27/16
Claimant: Respondent (1)

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 December 23, 2016, (reference 02) unemployment insurance decision that allowed benefits based upon a determination that claimant was not discharged for a current act of misconduct. The parties were properly notified of the hearing. A telephone hearing was held on January 20, 2017. The claimant, Jon Voss, participated. The employer, Whirlpool Corporation, participated through John West, HR specialist. The administrative law judge took official notice of the administrative record and the fact-finding documents.

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 brazer, from November 4, 2015, until December 19, 2016, when he was discharged for violating the employer's workplace violence policy. The incident leading to claimant's discharge occurred on November 19, 2016. That day, claimant was working with a substitute team lead. During the first part of claimant's shift, he threw the team lead a part. Claimant testified that the substitute team lead caught the part and they both continued working. West testified that the part hit the substitute team lead in the sternum. Later that day, claimant admits he used profanity toward the substitute team lead. Claimant contends he was joking, and he testified that profanity was not uncommon in the workplace.

On November 22, 2016, West received a report from the second-shift production supervisor about the incident that occurred on November 19. This supervisor had interviewed both claimant and the substitute team lead that day. When West received the report, he suspended

claimant pending further investigation and placed him on unpaid leave. Subsequently, West conducted an investigation. He interviewed both claimant and the substitute team lead. He also interviewed two witnesses, but neither witness reported actually witnessing the incident. West concluded his investigation and on December 13, 2016, he forwarded his recommendation to corporate. Once West received a response from corporate, he brought in claimant and discharged him. West testified that claimant received a copy of the workplace violence policy when he began employment. Claimant was never warned for any violations of the policy in the past.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1556.00, since filing a claim with an effective date of November 27, 2016, until the week ending December 24, 2016. Claimant testified he did not file for benefits after that week because he found other employment. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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).

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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 lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Here, the employer took approximately four weeks from the date it learned of the incident to ultimately discharge claimant. Initially, West brought claimant into the office and notified him that he was being suspended pending an investigation. The Thanksgiving holiday caused some delay, and the employer had to coordinate multiple interviews with both the witnesses and union representatives. The administrative law judge finds claimant was discharged for a current act.

The decision in this case rests, at least in part, upon the credibility of the parties. 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 employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Nor did the employer bother to submit a copy of the policy at issue. It is concerning that the substitute team lead's report to West was apparently significantly different than the way claimant described the incident. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the

administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Here, claimant was discharged after he swore at a coworker. Claimant testified that profanity was not rare in his workplace, as it was a manufacturing environment rife with frustrations. If management wishes to be treated with respect, it must enforce respectful treatment amongst coworkers and supervisors and apply those expectations consistently throughout the chain of command. Claimant had never been warned for any similar conduct in the past and his testimony that he swore in jest is persuasive, given the work environment. The employer has not established that claimant was discharged for disqualifying misconduct. Benefits are allowed. As claimant is eligible for benefits based on this separation from employment, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The December 23, 2016, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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