

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICOLE ROMMEL
Claimant

BARTELS LUTHERAN HOME INC
Employer

APPEAL 16A-UI-12981-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/30/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 28, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for using profane language on the job. The parties were properly notified of the hearing. A telephone hearing was held on December 22, 2016. The claimant, Nicole Rommel, participated. The employer, Bartels Lutheran Home, Inc., participated through Kevin Stocum, executive chef; and Veronica Shea, human resource generalist. Employer's Exhibits 1 through 11 were received and admitted into the record.

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 was employed part time, most recently as a cook, from November 19, 2014, until October 19, 2016, when she was discharged for using profanity in front of co-workers and residents. On claimant's final day of employment, she had a confrontation with Misty, one of her coworkers. Claimant was visibly upset by this incident. Stocum spoke with her and offered her the opportunity to take a break or go home so she could calm down, but she declined and returned to work. When claimant resumed working, she was still upset and Stocum testified that she was making other employees upset by slamming objects, moving rapidly, and acting with hostility. Stocum testified that he brought claimant to HR at this point, and she said she wanted to return to work again. When claimant returned to work, she said, "F*** this place." Two coworkers heard claimant, and two residents were in the dining room at the time. (Exhibits 2 and 3) After claimant's coworkers reported the incident to Stocum, he took claimant back to HR and she was discharged.

Claimant received a warning on December 4, 2015, for sending inappropriate text messages to a coworker. (Exhibit 6) The employer testified this was conduct claimant engaged in outside of work, and it is unclear how it related to or affected the work environment. Neither party provided

the contents of those text messages. Claimant also received warnings in the past for unrelated issues.

Claimant testified that she was overworked and stressed on October 19, as she had been working a lot of extra hours. Claimant recalled having an issue with Misty that day. After Stocum pulled claimant aside and talked with her, Misty kept asking claimant what was happening and claimant did not want to talk about it with her. When claimant refused to talk to Misty, Misty started to cry, which in turn upset claimant. Claimant testified that she swore that day because she was upset, even though she knew that it was not acceptable to swear at work. Claimant's father and mother participated in the hearing, acting as a witness and a representative respectively. They stated that claimant likely remained working on October 19, even though she was upset, in order to please the employer and do what she believed she was supposed to do. They indicated claimant had some workplace accommodation in place and believe the employer should have taken additional steps on October 19 to prevent what ultimately occurred.

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).

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. 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.

Every employer is entitled to expect civility and decency from its employees, and an employee's "use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct." *Henecke v. Iowa Dep't of Job Serv.*, 533 N.W.2d 573, 576 (Iowa App. 1995) (internal citation omitted). However, the use of profanity or offensive language is not automatically disqualifying for unemployment insurance benefits purposes. The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question... [and] must be considered with other relevant factors..." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). A recent Employment Appeal Board decision set forth six aggravating factors to be considered when examining an employee's use of improper language: "(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 context." Emp. App. Bd. Hrg. No. 16B-UI-08787, at *3 (Emp. App. Bd. pub. Oct. 21, 2016) (citing cases). The Employment Appeal Board also suggests that the general work environment is a relevant consideration in analyzing profanity. *Id.*

In this case, claimant swore in the dining room in front of coworkers and in the presence of residents. She was not swearing in response to an order from management, or about management, or in front of management. Nothing about claimant's statement undermined the supervisor's or employer's authority. Claimant did not threaten any violent action and did not state or imply that she planned to disobey management in the future or challenge her supervisor's instructions. Claimant's use of profanity was solitary; she did not use any additional profane language or repeat her profane comment. Nothing about claimant's comment was discriminatory in nature. Finally, while the parties did not testify about the work environment, claimant did testify that she knew profanity at work was not appropriate or tolerated by the employer.

Weighing the factors above, the administrative law judge finds that claimant's use of inappropriate language on October 19 is not disqualifying misconduct. While she may have used profanity in the presence of coworkers and residents, there is no evidence that she directed her profanity at anyone or exclaimed it loudly in a disruptive way. Claimant did not threaten any violence or suggest that she would be disobedient or disruptive in the future. This isolated incident of profanity occurred while claimant was overwhelmed and frustrated, and nothing about the incident indicates a deliberate disregard for the employer's interest in running its business and maintaining a civil and pleasant environment. The employer has not established that claimant engaged in disqualifying misconduct. Accordingly, benefits are allowed.

DECISION:

The November 28, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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