**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **JEFFREY L BOWEN**<br>Claimant<br><br>**CASEY'S MARKETING COMPANY**<br>Employer | **APPEAL 15A-UI-08325-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 06/28/15**<br>**Claimant: Appellant (1)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the July 20, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 17, 2015. Claimant participated. Employer participated through Store Manager Amber Hawkins. Employer Exhibit One was admitted into evidence with no objection. Claimant Exhibit A was admitted into evidence with no objection.

**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 full-time as a store employee from June 7, 2011, and was separated from employment on June 5, 2015, when he was discharged.

Claimant was discharged for violation of company policy and refusal to perform his job duties. Part of claimant's job duties was to make pizza for customers in an appropriate amount of time. The employer has a disciplinary policy that allows for three violations and then you are discharged; however, depending on the violation, it may discharge the employee prior to three violations being accumulated.

On June 4, 2015, claimant was responsible for answering the pizza phone and to make pizza in an appropriate amount of time. While claimant was working, Ms. Hawkins came into the store to do a store check. A female customer was in the store saying she tried to call multiple times over a 20 minute period, but the phone was always busy and she was never able to get through to place her order. Ms. Hawkins asked claimant were the pizza phone was and claimant did not know where it was located. Claimant found the phone on the back counter with a towel over it. The pizza phone was on when it was found, which is why the customer was getting the busy signal. The customer then asked claimant to make a pizza. Claimant did not respond to the customer and just stared at her. Ms. Hawkins then asked claimant to make the pizza. Claimant then wrote down the order. There were no other pizzas going at the time, so Ms. Hawkins told

the customer it would take about 20 minutes. Then Ms. Hawkins left the store. The customer left the store after placing her order. The customer's husband came back to the store approximately 25 minutes later, but the pizza had not even been started. Claimant told the customer's husband, "I am not going to f@#king make your pizza." The husband told claimant it was supposed to be ready 25 minutes ago, and claimant then started making the pizza. The customer got the pizza approximately 50 minutes after they had initially ordered it.

Claimant had received prior warnings; including for foul language (February 23, 2015) and for saying things that should not be said at work (November 19, 2012). Employer Exhibit One. Claimant also received a warning for talking about co-workers on August 8, 2012. Employer Exhibit One.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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:
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> 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.
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> 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted by both parties. While the employer did not present the customer to provide sworn testimony or submit to cross-examination, the combination of Ms. Hawkins's testimony and the employer's exhibits, when compared to claimant's recollection of the event, establish the employer's evidence as credible. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

"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." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). On June 4, 2015, claimant was supposed to take pizza orders and prepare them in a timely fashion. Claimant did not agree that the customer had been trying to contact the employer for 20 minutes to try to order a pizza. When claimant told the customer that he would not make their pizza, that is a violation of one of his core job duties; however, claimant did not just tell the customer he would not make the pizza, claimant told the customer, "I am not going to f@#king make your pizza." Claimant had been warned in the past for saying unprofessional comments while at work. To use profanity of this nature directly towards a customer is against the best interest of the employer. Claimant's use of profanity directly towards a customer is considered disqualifying misconduct, even if claimant did not believe there was a prior warning. Benefits are denied.

**DECISION:**

The July 20, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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