IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

FILADELFO MARTINEZ VEGA Claimant **EXEL INC** Employer	**APPEAL 15A-UI-09912-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/09/15** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the August 27, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 17, 2015. Claimant participated. Ike Rocha interpreted the hearing on behalf of claimant. Employer participated through Jose Vargas and Jennifer Guzman. Employer Exhibit One 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 fork lift operator from May 2, 2002, and was separated from employment on August 11, 2015, when he was discharged.

Mr. Vargas was claimant's direct supervisor. Mr. Vargas testified on August 10, 2015, claimant used obscene language towards him. Mr. Vargas testified claimant said to him, "You guys do whatever the f@#k you want to do." The incident started when claimant had some questions about Mr. Vargas committing a safety violation. Mr. Vargas explained to claimant that there was no safety violation. Mr. Vargas explained everything that was being done. Claimant got upset and was arguing with Mr. Vargas. Mr. Vargas asked claimant to get back to work. This is when Mr. Vargas testified that claimant made the comment directly towards him. Claimant denied saying any obscenity. Mr. Vargas told his supervisor what happened. Claimant was then called to the office. Claimant was suspended shortly after the meeting in the office. Claimant denied saying the obscenity in the meeting. Claimant was then suspended until the investigation was completed. Mr. Vargas testified there were no other employees around to hear the obscenity. On August 11, 2015, claimant was discharged for a class two violation, malicious language. Employer Exhibit One. Claimant did not have any prior warnings for similar conduct.

There is a policy against using profanity, "the malicious use of obscene, profane or abusive language and/or hand or body gestures toward fellow associates, customers or managers."

Employer Exhibit One. This is a class two work rule violations. Employer Exhibit One. For violations of class two work rule violations, it is subject to termination on the first offense. Employer Exhibit One. Claimant received these policies on February 27, 2014. Employer Exhibit One.

Other employees had used obscenity before while working for the employer. A similar incident occurred about six months prior to the August 10, 2015 incident. That employee had no prior warnings, so they were given a warning. Ms. Guzman testified that had claimant not already had a final written notification, he would have received a final written notification as opposed to termination. Ms. Guzman testified when an employee receives a final written notification, it does not matter what the next infraction is if it is within a 12-month period from the date of the final written notification, the next step is termination. Ms. Guzman testified there is no bending on the policy. Claimant received a final written notification on June 30, 2015 for a safety violation.

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.
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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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 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).

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.

The employer's argument that because claimant already had a final written notification and thus any violation results in immediate discharge is not persuasive. The reason for claimant's final written notification was a safety rule violation. Employer Exhibit One. Claimant had no prior warnings for obscenity. The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for a safety rule violation is not similar to a warning for obscenity and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

The employer has the burden to establish disqualifying job misconduct. "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). However, in the present case, claimant has denied saying any obscene language towards Mr. Vargas. There were no witnesses to the argument between Mr. Vargas and claimant. Furthermore, approximately six

months prior to the August 10, 2015 incident, an employee said an obscenity and the employer only gave that employee a written warning, as opposed to immediate discharge. Even if claimant uttered an obscenity towards Mr. Vargas, since the consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits.

Benefits are allowed.

DECISION:

The August 27, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs