

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**JOSHUA T MASER**  
Claimant

**LJPS INC**  
Employer

**APPEAL 15A-UI-13783-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/15/15**  
**Claimant: Respondent (1)**

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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 10, 2015 (reference 02) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on January 7, 2016. The claimant participated personally. The employer participated through Matt Sinnwell. Todd Soglesong also participated for the employer. Employer exhibit one was admitted into evidence.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the Agency be waived?

Can any 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: The claimant was employed as a part-time line cook and was separated from employment on November 6, 2015; when he was discharged for poor attitude.

On November 6, 2015, the claimant was working in the kitchen with peers when his manager, Todd Soglesong, came back asking if anyone had food ready for him. There had been some unexpected issues during the shift that day and multiple employees displayed frustration, including the claimant and Mr. Soglesong. The claimant admitted to cursing in frustration and saying "fuck this" during his shift. Mr. Soglesong also used profanity at the claimant telling him to "Shut the fuck up. You're not the only fucking person on the line." The claimant was subsequently discharged for the exchange and proceeded to throw down his kitchen tongs. Mr. Soglesong was not disciplined for his language or part in the exchange.

The evidence is disputed as to whether the claimant had received prior warning for similar conduct. The claimant denied being presented or having discussed the November 4, 2015 warning (Employer's Exhibit One) and neither employer witness who attended the hearing could provide details of what incident triggered the warning for alleged poor attitude or why the claimant had not signed it. The employer also asserted the claimant had multiple verbal warnings but was unable to provide any specific events or dates associated with the warnings.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1729 since filing a claim with an effective date of November 15, 2015; for the through the week ending January 2, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview on December 8, 2015.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a). "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).

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has not met its burden of proof to establish misconduct.

In this case, the claimant was discharged based on his poor attitude and language when he was observed using profanity including “fuck this” on November 6, 2015; during a period of stress in the kitchen. It cannot be ignored that during the same time, the claimant’s manager, Todd Soglesong, said to the claimant “Shut the fuck up. You’re not the only fucking person on the line” and was not reprimanded for his language or attitude. 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. The administrative law judge does not condone the language used by the claimant and even though the claimant did use profanity, since the consequence received was more severe than other employees including what his own manager received for similar conduct, the disparate application of the employer’s policies cannot support a disqualification from benefits. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

**DECISION:**

The December 10, 2015 (reference 02) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The claimant has not been overpaid benefits and the employer’s account shall not be relieved of charges associated with this claim.

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Jennifer L. Coe  
Administrative Law Judge

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Decision Dated and Mailed

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