IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

ZACHARY M ALLEE
Claimant

LOWE'S HOME CENTERS INC
Employer

APPEAL NO: 13A-UI-10208-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/11/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Zachary M. Allee (claimant) appealed a representative's September 3, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Lowe's Home Centers, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 6, 2013. The claimant participated in the hearing, was represented by Toby Gordon, Attorney at Law, and presented testimony from two other (subpoenaed) witnesses, Mitchell Lowe and Jennifer Gardner. Bob Luker appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Four and Claimant's Exhibit A were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on December 13, 2012. He worked part time (20 – 30 hours per week) as a customer service associate at the employer's Burlington, Iowa store, primarily working Fridays, Saturdays, and Sundays. His last day of work was August 13, 2013. The employer discharged him on that date. The reason asserted for the discharge was a conclusion that the claimant had been verbally abusive in violation of the employer's policies after a prior warning.

On May 25, 2013 the employer had given the claimant a first and final warning for a variety of concerns, including job performance issues, complaints about being rude to customers, and a report that he had called a coworker a "b - - - -." The claimant denied that he had called a

coworker a “b - - - -,” but acknowledged that further issues such as using verbally abusive language toward other employees could result in his discharge.

On or about August 10 the claimant received an email from the employer’s corporate human resources office indicating that he had been signed up for a management training class. He later showed the email to the store manager and asked if it was true. The store manager answered that no, it had been a mistake.

At the end of the shift on either August 11 or August 12 the claimant again approached the store manager to discuss why he was not being selected for the management training program. He was upset, and the store manager did ask that the conversation be taken into the managers’ office, with which the claimant complied. The employer asserted through second-hand statements from the store manager and the assistant store manager that the claimant had then several times stated that he felt he was being “f - - - ed” or “screwed” by the employer. The claimant acknowledged in his first-hand testimony that he had been pretty upset, and acknowledged that he probably said that he felt he had been “screwed” by the employer, but denied saying that he felt he had been “f - - - ed.” He further indicated that he had not directed any of his comments toward either of the managers personally, and denied that there were any customers or other employees present.

The employer concluded that the claimant’s statements to the managers that he felt he had been “f - - - ed” or “screwed” by the employer constituted verbally abusive language toward other employees in violation of the employer’s policies. Since the claimant had been given the final warning in May which also touched upon this issue, the employer determined to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his expression of disgruntlement to the employer's managers after learning that despite receiving the promising email, he was not being selected for the management training class, in light of the final warning for various issues he had received in May. 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. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). The employer relies exclusively on the second-hand accounts from the two managers; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether they might have been mistaken or whether they are credible. The claimant denies using the more serious of the words alleged, a variation of the "f-word." The employer has not established that other employees or particularly any customers heard any of the dialogue between the claimant and the managers. In no version of the events does it appear that the claimant addressed any of the vulgar terms toward the managers or any other employee, but rather how he felt he himself had been treated; it does not appear that any language which might have been used was "in a confrontational, disrespectful, or name-calling context." The employer's witness acknowledged that not all usages of vulgar language by employees on the employer's premises result in disciplinary action. Under the facts of this case, the claimant's usage of questionable language in expressing his deep disappointment was not substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence or a good faith error in judgment or discretion. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 3, 2013 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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