

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JEREMY S BROSDAHL**  
Claimant

**CEMEN TECH INC**  
Employer

**APPEAL 18A-UI-04781-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/15/17  
Claimant: Respondent (1)**

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 April 16, 2018, (reference 07) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 14, 2018. The claimant participated and testified. The employer participated through Human Resource Director Michelle Eggleston. Ken Jokerst was also present on behalf of the employer but did not testify. Employer's Exhibits 1 through 3 were received 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: Claimant was employed full time as a welder from November 7, 2017, until this employment ended on March 29, 2018, when he was discharged.

On March 22, 2018, claimant was involved in an incident with another employee. On the date in question claimant and the employee were interacting with each other. The other employee left to go get some parts and as he left said, "I'll be back." Claimant responded by telling him he was like Schwarzenegger. Claimant testified he made the comment because the other employee's statement reminded him of a famous line uttered by Arnold Schwarzenegger in The Terminator. The other employee, who is African American, believed claimant had deliberately mispronounced Schwarzenegger's last name to make it sound like a racial slur. Claimant denied doing any such thing, but apologized to the employee if he was offended. The other employee was insistent on what he heard and continued to remain upset with the claimant.

According to claimant the other employee was so upset he made several comments that led claimant to believe things might become physical.

The employer became aware of this incident the following day, when claimant reported the interaction after he felt threatened by the other employee's response. An investigation was immediately opened. The employer spoke to two employees in the vicinity of the incident when it occurred. One employee said he had not heard the comment at all, the other said he did hear the exchange, but claimant had not mispronounced Schwarzenegger. While the investigation was ongoing another employee, who was not present for the exchange, approached the human resource department regarding a conversation he had with claimant about the exchange. This employee reported claimant told him he thought he had upset his coworker by mispronouncing the name Schwarzenegger. The employer took this conversation to mean claimant was admitting to deliberately mispronouncing the name to include the racial slur, though that is not specifically what was reported to them by the other employee. Based on his information the decision was made to discharge claimant from employment for violating its workplace harassment policy. (Exhibits 2 and 3). Claimant had no prior warnings or disciplinary action. Claimant testified he had spoken to the other employee, but was only relaying what his coworker thought had been said and his frustration with the situation, rather than what he actually said.

The claimant filed a new claim for unemployment insurance benefits with an effective date of October 15, 2017 and an additional date of April 1, 2018. The claimant filed for and received a total of \$2,382.00 in unemployment insurance benefits for the weeks between April 1 and May 12, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on April 13, 2018. The fact finder determined claimant qualified for benefits.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 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). 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). 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be credible.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. Claimant made a joke, which was misunderstood to be a racial slur. However, claimant provided credible testimony that he did not intend his comment as such, but that his coworker misheard what he said. While it may be advisable for claimant to think about how his comments might be heard by the intended recipient going forward, here no misconduct has

been shown. The employer 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. Accordingly, benefits are allowed, provided claimant is otherwise eligible. As benefits are allowed, the issues of overpayment and participation are moot.

**DECISION:**

The April 16, 2018, (reference 07) 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. The issues of overpayment and participation are moot.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs