

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARJAN STOJANOV
Claimant

APPEAL NO: 18A-UI-03222-JC

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC
Employer

OC: 10/01/17
Claimant: Appellant (1R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code Chapter 95 – Requalification

STATEMENT OF THE CASE:

The claimant/appellant, Marjan Stojanov, filed an appeal from the March 7, 2018, (reference 07) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. After due notice was provided, a hearing was held in Spencer, Iowa on May 18, 2018. The claimant participated in person. The employer participated through Jose Sorto Ramirez, by telephone. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, 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 disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a laborer and was separated from employment on February 1, 2018, when he was discharged by Jose Sorto Ramirez. Since his separation, the claimant has worked part-time at Hy-Vee. He also began full-time employment approximately one month prior to the hearing, but did not want to disclose his new employer in the presence of his former employer. The issue of requalification has not yet been investigated or adjudicated at the claims level.

At the time of the claimant's hire, he was managed by Kyle. At the end of his employment, he was managed by Mr. Ramirez. Shortly after Mr. Ramirez began managing the claimant, he made some staffing changes. Namely, he removed the claimant from his leadership position, which was noted by a "red helmet". The claimant stated this was because he was upset about not receiving a pay increase when he had been made a red helmet under prior management, and that he had filed a complaint in response. Approximately one week before discharge, the claimant and Mr. Ramirez met over a break and smoked cigarettes, and Mr. Ramirez told the claimant he would return the red helmet status to the claimant, but he did not. The evidence is

disputed as to whether the claimant had been formally warned through a verbal warning by Mr. Ramirez before his discharge for his conduct or performance.

After inspecting the lines on February 1, 2018, the claimant, two co-workers, and a supervisor, were called to Mr. Ramirez's office to discuss the inspection. Mr. Ramirez stayed in his office while the claimant and others stood outside the door of the office. The claimant used his cellphone to record approximately 17 minutes of the conversation, which began in Spanish and transitioned to English. The conversation was played at the hearing, and reflected the claimant and Mr. Ramirez as the parties speaking to each other. During the conversation, the claimant repeatedly raised his voice mimicking Mr. Ramirez's voice, and the claimant made comments including:

"You need to follow company rules, you understand that?"

"The problem came when you came here."

"You don't have experience. You don't have knowledge."

"You don't understand nothing."

"Why do you lie to me? People who lie, they also steal. And they are not honest."

"I strongly believe you should be terminated for harassing, and for the way you are."

During the conversation, the claimant also repeatedly challenged the authority of Mr. Ramirez, while raising his voice. The conversation was so escalated that the employer's customer interrupted and stated, "I have people coming in. I don't need barking and screaming."

The conversation ended shortly thereafter with Mr. Ramirez quietly informing the claimant he was discharged and asking him to sign a document. The claimant was heard on the recording repeatedly asking why he was being fired and Mr. Ramirez did not engage, saying only, "are you going to sign or not?" The claimant continued to argue stating that he was entitled to progressive discipline and that Mr. Ramirez must follow progressive discipline to discharge him. It was unclear from the evidence whether Mr. Ramirez originally intended to fire the claimant when calling him to the office with the co-workers, or if the situation escalated in a way that Mr. Ramirez decided while the claimant was at the office to fire him based on his conduct.

The employer's policy states that employees must be courteous and respectful. The employer has progressive discipline for minor violations and that "nothing in this handbook creates an obligation to follow any particular disciplinary procedure. Management may skip certain disciplinary steps or repeat disciplinary depending on particular facts of each situation" (See administrative record.)

At the hearing, Mr. Ramirez summarized the reason for the claimant's separation as not being his best self. He referenced there had been some performance related issues regarding clean production lines but that he was disrespectful and argumentative. This is consistent with the reason he provided at the fact-finding interview for separation.

The claimant opined he was not disrespectful, did nothing wrong, and was given no reason for his discharge. He further argued that the employer should not be able to fire him without an explanation, and if it can, that he should be eligible for unemployment insurance benefits.

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.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

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).

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

This case rests on the credibility of the parties. 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). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*,

604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

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.* The administrative law judge had the ability to observe the claimant's appearance and conduct in person during the hearing. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as well as the claimant's demeanor and conduct at the hearing, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer's hearsay evidence to be more credible than the claimant's evidence. The employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

An employer has the right to allocate personnel in accordance with the needs and available resources. *Brandl v. Iowa Dep't of Job Serv.*, (No. ___-___/___-___, Iowa Ct. App. filed ___, 1986). An employer also has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). It must be considered with other relevant factors...." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990).

Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) **undermining a supervisor's authority** (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Service*, 333 N.W.2d 735 (Iowa App. 1983) (Emphasis added) The consideration of these factors can take into account the general work environment, and other factors as well.

At issue is not profanity or vulgar language, but rather the claimant's combative, argumentative and insulting interactions with his manager, Jose Sorto Ramirez, in the presence of co-workers and the employer's client. The entire conversation was dominated by the claimant, who purposefully insulted and challenged the authority of Mr. Ramirez, over and over. It was unclear whether the claimant also intended to create dissension or tension with management, but at a minimum, was disruptive and unprofessional. This was not a single comment or moment of frustration but rather a continued outburst that lasted for several minutes in a public area. The administrative law judge is persuaded the claimant purposefully caused a scene in the presence of co-workers, the employer's client and management through his loud, mimicking of Mr.

Ramirez, repeated insults and attempts to undermine his authority. The claimant's conduct was blatantly disrespectful.

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). Even if the claimant had not been previously counseled for his conduct or performance, the administrative law judge is persuaded that his conduct while outside of Mr. Ramirez's office on February 1, 2018 was egregious enough to warrant immediate discharge without prior warning. This is also consistent with employer policy which permits the employer to bypass steps of progressive discipline depending on circumstances. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

REMAND: The issue of whether the claimant has requalified for benefits since separation from this employer is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The March 7, 2018, (reference 07) decision is affirmed. 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. **REMAND:** The issue of whether the claimant has requalified for benefits since separation from this employer is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn