

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

PHILLIP P LEVESQUE
Claimant

SAFELITE FULFILLMENT INC
Employer

APPEAL 17A-UI-12972-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/26/17
Claimant: Appellant (1R)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 13, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 12, 2018. The claimant participated personally. The employer participated through Glenn Healy, store manager. Claimant Exhibit A was admitted into evidence. 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 glass technician and was separated from employment on November 27, 2017, when he was discharged.

Prior to separation, the claimant was on a leave of absence due to medical issues related to his diabetes and his neck. At the time of separation, the claimant's treating physician would not release him to return to work, which delayed his ability to return to work.

The claimant went to the employer premises on October 26, 2017, and requested to fill out a worker's compensation claim based upon an injury he incurred approximately one year before. The undisputed evidence is that while in Mr. Healy's office, he was being assisted on the computer with Mr. Healy standing while he sat. At some point, there was discussion about Mr. Healy witnessing the accident, to which Mr. Healy stated he could not verify what happened. The claimant interpreted Mr. Healy's comments to mean he was calling the claimant a liar. The disputed evidence is whether Mr. Healy "got in the face" of the claimant so close, that his saliva

landed on the claimant, but the undisputed evidence is the claimant at one point said, "I will deck you" or "I will lay you out." He was then told to sit down by Mr. Healy.

Then on November 6, 2017, the claimant called the employer premises and spoke to Mr. Healy about their prior incident involving the worker's compensation claim. Again, the claimant alleged that Mr. Healy was calling him a liar, and again, Mr. Healy stated he was not. During the conversation, the claimant stated he was going to come to the employer premises and "lay me (Mr. Healy) out". The claimant was then advised not to return to work. Upon escalating the matter to human resources, it was determined the claimant would be discharged for his threatening comments. The actual discharge did not occur until November 28, 2017. The reason for the delay was the inability to reach the claimant by the phone number provided by him to the employer. The employer ultimately looked up in the phone book a former business owned by the claimant to find a phone number to reach him.

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).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that 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.

"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). The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe or violent conduct in the workplace, in an era where violence in the workplace is real.

The claimant in this case, was discharged after he made two threats of physical violence on October 26, 2017 and November 6, 2017 to Mr. Healy. The claimant's reasons for making the comments were he believed that Mr. Healy said or thought he was a "liar". Based on the evidence presented, the administrative law judge is persuaded the claimant's comments were intended to be threatening and could lead to discharge. The fact the discharge itself was delayed was solely based upon the employer's inability to reach the claimant at a working phone number, and does not negate a current or final act occurred that led to discharge. The claimant knew or should have known his conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. The employer has satisfied its burden of proof that the claimant was discharged for disqualifying job-related misconduct. Benefits are withheld.

REMAND: The issue of whether the claimant is able to and available for work effective November 26, 2017, based on his medical conditions is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The December 13, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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 is able to and available for work effective November 26, 2017, based on his medical conditions 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