IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

NICHOLAS CORLEY Claimant **MARTIN-BROWER CORPORATION LLC** Employer	**APPEAL 19A-UI-09275-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/27/19** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the November 14, 2019 (reference 01) unemployment insurance decision that found the claimant was not eligible for benefits based upon his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on December 18, 2019. The claimant, Nicholas Corley, participated personally. The employer, Martin-Brower Corporation LLC, participated through witness Nicole Uhde.

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: Claimant was employed full-time as a warehouse worker. He began working for the employer on December 12, 2018 and his employment ended on October 29, 2019. Justin Green and Britany Grady were claimant's immediate supervisors.

This employer is a distribution company. Claimant's job duties included selecting orders and loading the orders in the trucks. The employer's written work rule #11 states that the use of abusive, obscene or threatening language towards others, be they fellow employees, supervisors, or customers, is not allowed. The written policy provides that violation of this rule can lead to a final written warning or termination based on the details of the occurrence. Claimant received a copy of this rule and was aware of it.

The final incident leading to discharge occurred on October 24, 2019. Claimant was physically present at the employer's facility, outside, prior to work. He had not yet clocked in for his shift and was smoking a cigarette. Another co-worker told him to "have fun doing selection tonight" and claimant responded back "have fun working with the pedo tonight". This comment was heard by the co-worker that the claimant was speaking to as well as another co-worker. The comment was not made in private conversation. Claimant was referring to another co-worker when he used the word "pedo". The co-worker that the claimant was referring to is a convicted

sex offender and claimant was aware that the co-worker was on the sex offender registry list. Claimant made the comment because the claimant believed that no one liked working with this co-worker. Claimant believed this co-worker threw fits at work and was a hazard to everyone. Claimant intended his comments to be disparaging. He was not using the term “pedo” in a factual or informative way.

Claimant had received a verbal warning for violation of the employer’s work rule #11 on September 19, 2019, after using profanity with another co-worker. Claimant did not sign an acknowledgment of the warning.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; 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).

An employer 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). The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. 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, or offensive behavior 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*, 462 N.W.2d at 738 (Iowa App. 1990); *Deever v. Hawkeye Window Cleaning*, Inc. 447 N.W.2d 418, 421 (Iowa Ct. App. 1989); *Henecke*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W. 2d 242, 246 (Iowa App. 1986); *Zeches v. IDJS*, 333 N.W.2d 735 (Iowa App. 1983). An offensive comment can be misconduct even where the target of the comments is not present. *Myers*, 462 N.W.2d at 738 (Iowa App. 1990).

Under the definition of misconduct for purposes of unemployment insurance benefits disqualification, the conduct in question must be "work-connected". *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). A claimant can be disqualified for benefits when their off duty conduct is a violation of a specific work rule. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416 (Iowa 1992).

The final incident in this case was not an act of carelessness or poor work performance. Claimant intentionally used a word intending to be disparaging about another co-worker. This was the second time in less than two months that the claimant engaged in an incident of vulgarity. Claimant's actions were certainly in connection with the individual's employment. Iowa Code § 96.5(2). While the claimant was not working at the time the comment was made, he was physically present at the employer's facility, speaking to a co-worker, and speaking about a co-worker. This incident further created harm to the employer's interests by disparaging another co-worker at work. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

The employer has established that the claimant's actions were in violation of the employer's known and reasonable written policy and that the claimant's actions were a substantial and willful disregard of the employer's interest. Accordingly, the employer has met its burden of proof in establishing that the discharge from employment was based upon a final incident of job-related disqualifying misconduct. Benefits are denied.

DECISION:

The November 14, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for a current act of job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount after his separation date, and provided he is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/scn