

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**LORI MILLER**  
Claimant

**TATERS SPA LLC**  
Employer

**APPEAL 21A-UI-13345-SN-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/21/21**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer, Taters Spa LLC, filed an appeal from the May 28, 2021 (reference 01) unemployment insurance decision that granted benefits based upon the conclusion the claimant was discharged, but the record did not show willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on August 10, 2021. The claimant participated and testified. Madison Voshell provided witness testimony in support of the claimant's claim. The employer participated through Owner Kennedi Simon. Official notice was taken of the administrative records. Exhibits 1, 2 and A were received into the record.

**ISSUE:**

- Was the claimant discharged for disqualifying job-related misconduct?
- Whether the claimant was overpaid benefits? Whether the claimant is excused from repaying benefits due to the employer's non-participation at fact finding.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Lori Miller, worked as a full-time bather for the employer from December 5, 2020 to March 23, 2021. The claimant reported directly to Owner Kennedi Simon. Her schedule varied from 32 hours to over 40 hours per week. At the time of her hire, Ms. Simon and the claimant agreed she would be paid \$16.00 per hour.

The employer does not have an employee handbook outlining its various policies. The employer did not have any sort of training or orientation, in which employees were given the employer's expectations for conduct.

On March 15, 2021, Ms. Simon determined she had not been making enough of a profit. Ms. Simon told the claimant that she would be imposing a reduction to her hourly rate from \$16.00

to \$12.50. In response, the claimant said she would be looking for another job. She did not give any specific timeframe for leaving or state she was quitting.

On March 16, 2021, Ms. Simon sent the claimant a text message to try and figure out what her plans were. The claimant replied through text that she would be looking for another job. She did not give any specific timeframe for leaving or state she was quitting. In response, Ms. Simon told her that she would be terminating her employment effective April 1, 2021.

On March 18, 2021, Ms. Simon sent the claimant home early because she could not justify keeping her there given how little work they had. The claimant took all of her items from the store. In that context, Ms. Simon asked if she was returning. In response, the claimant wrote, "Are you going to keep cutting time, so I don't make shit."

On March 23, 2021, the claimant and Ms. Simon had a dispute regarding some fabric the claimant purchased for the store when it was out of supplies. At one point, Ms. Simon said she believed she reimbursed the claimant for the fabric by paying her extra on a paycheck. In response, the claimant asked, "Why the hell would you put that in my paycheck? That gets taxed as income." In response, the claimant said she would be talking to Legal Aid about her rights. Other than that swear word, the claimant did not utter profanity on that day. Ms. Simon mentioned that she would be talking to her attorney. Ms. Simon told the claimant she needed to leave and could not return to the shop.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct. The overpayment issue is moot because the claimant's separation is not disqualifying.

First, the administrative law judge will explain why this is not a voluntary quit case.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v.*

*Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. EAB*, 433 N.W.2d 700 (Iowa 1988).

This case is not a quit case because the claimant did not ever quit. She did say she would be looking for work somewhere else, but no definitive plans had been made at that time to constitute an overt act. Alternatively, the claimant's quit would have been with good cause because her reason would have been due to a substantial change in the contract of hire under Iowa Admin. Code r. 871-24.26(1). While Ms. Simon contends the claimant never had a written contract, she acknowledges they verbally agreed the claimant would be paid \$16.00 per hour.

However, the administrative law judge reiterates that this is a discharge case because the employer initiated the separation from employment. Following is the administrative law judge's reasoning regarding whether the claimant's discharge is disqualifying.

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

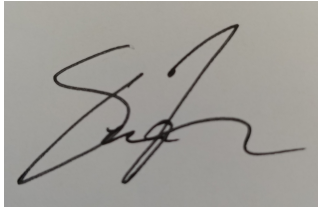
An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). "An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority." *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418, 421 (Iowa Ct. App. 1989). 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 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). While there is no citation for discriminatory content, but there is no doubt that this is an aggravating factor. The consideration of these factors can take into account the general work environment, and other factors as well.

In this case, the claimant sent a text message reading, "Are you going to keep cutting time, so I don't make shit." The employer terminated the claimant in response to this message. This swear word does not fit any of the factors listed above and falls squarely within the holding of *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). While it may be argued the claimant's use of the phrase, "Why the hell would you put that in my paycheck? That gets taxed as income," constitutes repeated vulgarity, she had already been terminated at that point. Furthermore, the claimant's use of the swear word "hell" does not meet any of the aggravating factors listed above. The claimant was terminated for non-disqualifying conduct. Benefits are granted, provided she is otherwise eligible. The overpayment issue is moot because she is entitled to benefits.

**DECISION:**

The May 28, 2021 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged for non-disqualifying conduct. Benefits are granted, provided she is otherwise eligible. Since the claimant is entitled to benefits, the overpayment issue is moot.

A handwritten signature in black ink on a light gray background. The signature is stylized and appears to read 'S. Nelson'.

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Sean M. Nelson  
Administrative Law Judge  
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August 12, 2021  
Decision Dated and Mailed

smn/kmj