

In November 2014 he called a supervisor a “fuck face” and was warned. In December 2016 he received a warning for calling a contract employee a “fat ass.” On January 11, 2017 the Claimant was again warned for foul language and told that he could not continue to have profane outbursts on the production floor. He had at that time called supervisors “fucking idiots.” On November 6, 2017 the Claimant received a coaching for calling something “bullshit” and referring to someone as a “fucking ass.”

On August 31, 2018 Mr. Raab asked the Claimant about downtime on Claimant’s machine. Claimant was not cooperative and told Raab to check the downtime application himself. Mr. Raab remarked that Finishing Supervisor Derrick Howard had reported that a required chart change had not been completed. The Claimant responded with a rant. He called Mr. Howard different vulgar names, and used racial terms as well, including “black motherfucker.” He referred to other supervisors as “cocksuckers.” Three other people overheard the remarks by the Claimant.

Raab documented this incident and reported it to another member of management, who reported the incident to Human Resource Director Penning. Claimant was immediately suspended pending investigation. During the investigation, Penning talked with Raab and three other individuals who were in the office and overheard Claimant’s language. The Employer decided to discharge Claimant based on the incident.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2018) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

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). 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, including the context in which it is said, and the general work environment." *Meyers 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. IDJS*, 333 N.W.2d 735 (Iowa App. 1983). An offensive comment can be misconduct even where the target of the comments are not present. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). The consideration of these factors can take into account the general work environment and other factors as well.

A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984). In *Warrell* the claimant had been warned repeatedly over failure to follow directions, and over intimidation. His probationary period was extended. On his final day Mr. Warrell was being warned about again not following the rules when he replied "get the fuck out of my sight" or words to that effect. The Board denied benefits, but the district court allowed them reasoning that this single outburst was not disqualifying. The Iowa Court of Appeals reinstated the disqualification with a discussion that is instructive:

To say that Warrell's actions were "a peccadillo" or that "decorous language is not required," effectively ignores the fact that Warrell was then a probationary employee and the employer had been down this same road with him several times before. Use of foul language can alone be a sufficient ground for a misconduct disqualification. *Zeches v. Iowa Dept. of Job Service*, 333 N.W.2d 735 (Iowa Ct.App.1983). But we do not view the vulgar language used by Warrell as solely determinative on the question of misconduct. ... What is significant is that Warrell and Armstrong Rubber had already agreed that the company was going the extra mile when it

granted a probationary status to him. The conditions of

employment were that supervisors' orders regarding temporary transfer or reassignment were to be immediately complied with. Instead of accepting these conditions, Warrell embarked on his own course of active resistance culminating in a blast of verbal abuse of his supervisor.

Warrell at 590. Here the language is worse than in *Warrell*. And just as in *Warrell* the Employer already had gone the extra mile to keep the Claimant on the job. Although the last chance agreement was 8 years old it had no expiration date, and the Claimant was well aware of it. And even if we regarded the agreement as no longer in effect the mere fact that he had come so close to being fired for very similar outbursts makes clear that he well knew how serious this situation was. And since 2010 he had been repeatedly warned about similar conduct. While the Employer advised the Claimant to vent in the office rather than on the floor, this cannot reasonably be taken as an open invitation for the Claimant to say *anything at all* so long as it is in the office. Repeatedly referring to a co-worker as a "black motherfucker," even though in the office, was beyond the pale, and this was in addition to the other profane remarks he made that day. It was out of earshot of the worker involved, but the Court of Appeals has instructed that comments outside the presence of the target can still be misconduct. *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). The comments were vulgar, repeated, and with discriminatory content. In addition, the comments were made about supervisors within hearing of co-workers and had a tendency to undermine the supervisors' authority. We understand that vulgarity was common in the general environment. Yet the evidence supports that racist statements were not common, and they were specifically banned by the Employer's policies. Nor was this level of disrespect towards management. On balance, given the various factors and the fact of the Claimant's prior warnings we find that the Employer has carried its burden of proving misconduct by a preponderance of the evidence.

DECISION:

The administrative law judge's decision dated October 17, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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