

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRYAN N KIRKHART
Claimant

APPEAL 24A-UI-07713-PT
ADMINISTRATIVE LAW JUDGE
DECISION

VERMEER MANUFACTURING CO INC
Employer

OC: 08/04/24
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Bryan Kirkhart, filed an appeal from a decision of a representative dated August 26, 2024, (reference 01) that held the claimant ineligible for unemployment insurance benefits after a separation from employment. After due notice, a hearing was held in Des Moines, Iowa on September 18, 2024. The claimant participated personally. The employer, Vermeer Manufacturing Company, Inc., was represented by Attorney Michael Boal and participated through Human Resources Business Partner Brittany Pearson. The employer's Exhibits A through E were admitted into evidence. The administrative law judge took official notice of the administrative record.

ISSUE:

Whether the claimant was discharged for disqualifying, job-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant began working as a full-time paint engineer II for Vermeer Manufacturing Company, Inc. on May 3, 2004. The claimant was separated from employment on August 5, 2024, when he was discharged.

As a paint engineer II, the claimant was responsible for maintaining and supporting the plant's paint operations by performing preventative maintenance on machines and troubleshooting problems as they arose. The employer has a written employee manual that includes a code of conduct policy. The code of conduct policy prohibits employees from engaging in vulgar, obscene, harassing, or bullying behavior. The claimant received a copy of the employee manual and was familiar with the employer's work rules and policies.

On July 18, 2024, the employer's human resources department received an anonymous complaint from an employee alleging that the claimant had made multiple disparaging comments about women, some involving violence. Specifically, the complaint stated: the claimant once commented to another employee that their coworker "had a nice ass;" that during a meeting on July 17, 2024, the claimant allegedly said, "Women are cheaper to rent than buy;" and that the claimant had once worn a shirt to work that stated, "A women is like a motorcycle,

you keep throwing money at it with the hopes of getting the ride of your life.” A human resources representative began an investigation the next day.

The HR representative began her investigation by identifying all of the employees who attended the staff meeting on July 17, 2024. The HR representative determined that there were 11 employees in attendance including the claimant. The HR representative then investigated the allegation by calling each of the employees who had attended the meeting to her office one at a time and asking the employees whether they recalled the claimant making any inappropriate remarks during the meeting.

Most of the employees recalled that the claimant wore an inappropriate shirt to work by mistake approximately one month prior. However, of the ten employees who attended the meeting, eight of them had no recollection of the claimant making an inappropriate remark during the meeting. One of those eight employees stated that he could not recall the claimant making any inappropriate remarks in the past 5 to 6 years. Another said that he could not recall anything unusual about the July 17 meeting and that nothing the claimant had said stood out in his mind.

One employee who was interviewed recalled a comment made at some point during the meeting about “women being cheaper to rent than buy. However, the employee stated that he could not recall any details because he was setting up his computer and files at the time. Ultimately, only one employee who had attended the July 17 meeting clearly recalled the claimant stating, “Women are cheaper to rent than buy.” That employee reported that he had also witnessed the claimant comment to another employee that their coworker “had a nice ass.” The employee told the HR representative that the claimant had a long history of making inappropriate comments, but that the claimant’s supervisor and coworkers tolerated the claimant’s behavior.

After interviewing the ten witnesses, the HR representative called the claimant into a meeting and questioned the claimant about whether he had heard any inappropriate remarks during the meeting. During the interview, the claimant admitted that approximately one month prior, he had grabbed the wrong shirt while he was getting dressed and mistakenly wore an inappropriate shirt to work. The claimant said that as soon as he realized his mistake he reported the shirt to his supervisor. The claimant’s supervisor did not tell the claimant to turn the shirt inside-out or issue the claimant any discipline for the mistake. When asked whether he heard any inappropriate comments during the July 17 meeting, the claimant said he vaguely recalled a comment being made along the lines of, “Women are cheaper to rent than to buy.” However, the claimant said he could not recall who had made the remark.

After interviewing the claimant, the HR representative concluded the investigation and wrote a report detailing her findings. On August 5, 2024, the employer called the claimant into a meeting and informed the claimant that his employment was being terminated effective immediately due to making derogatory and discriminatory comments towards women in violation of the employer’s code of conduct policy. Prior to his termination, the claimant had never received any warnings or discipline, was not aware that his job was in jeopardy, and felt he was performing his job to the best of his ability.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)(a) and (d) provide:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

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.

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 the 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

Every employer is entitled to expect civility and decency 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." *Henecke v. Iowa Dep't of Job Serv.*, 533 N.W.2d 573, 576 (Iowa App. 1995). However, the use of profanity or offensive language is not automatically disqualifying for unemployment insurance benefits purposes. The "question of whether the use of improper language in the workplace is misconduct is nearly always a fact question... [and] must be considered with other relevant factors..." *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). An Employment Appeal Board decision set forth six aggravating factors to be considered when examining an employee's use of improper language: "(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 context." Emp. App. Bd. Hrg. No. 16B-UI-08787, at *3 (Emp. App. Bd. pub. Oct. 21, 2016) (citing cases). The Employment Appeal Board also suggests that the general work environment is a relevant consideration in analyzing profanity. *Id.*

Conduct asserted to be disqualifying misconduct must be current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App.

1988). Whether the act is current is measured by the time elapsing between the employer's awareness of the misconduct and the employer's notice to the employee that the conduct provides grounds for dismissal. *Id.* at 662.

The current act requirement prevents an employer from saving up acts of misconduct and springing them on an employee when an independent desire to terminate arises. For example, an employer may not convert a layoff into a termination for misconduct by relying on past acts. If an employer acts as soon as it reasonably could have under the circumstances, then the act is current. A reasonable delay may be caused by a legitimate need to investigate and decide on a course of disciplinary action.

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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the claimant's testimony that he did not make any derogatory or discriminatory comments during the July 17, 2024, staff meeting to be more credible than the employer's testimony, as the claimant was the only witness who testified with direct, first-hand knowledge of the events at issue and his testimony is consistent with the statements of nine of the ten witnesses who attended the meeting.

The claimant was discharged for allegedly making disparaging remarks about women at work and for wearing an inappropriate shirt to work. As to the inappropriate shirt, this incident occurred approximately one-month prior to the claimant's termination, the claimant reported the shirt to his supervisor that same day, and his supervisor chose not to issue the claimant any discipline. As this mistake occurred a month before the claimant's termination and had already been addressed by the employer, this act was no longer current.

As to the claimant allegedly making disparaging remarks about women at work, this is an accusation the claimant has consistently and credibly denied occurred, and his denial is supported by nine of the ten witness statements provided by employees who worked with the claimant and attended the July 17, 2024 meeting. The employer's only evidence in support of its allegation is a single written witness statement, which is hearsay, indistinct, and lacks important details. The employer has the burden of proof. The employer has failed to prove that the claimant was in violation of any rule or policy.

Finally, as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there

are changes that need to be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate, detailed, and reasonable notice should be given. As such, benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The August 26, 2024, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment on August 5, 2024, for no disqualifying reason. The claimant is allowed benefits, provided he remains otherwise eligible.



Patrick B. Thomas
Administrative Law Judge

October 1, 2024
Decision Dated and Mailed

PBT/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.