IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

STACEY D LARSON Claimant **MENASHA PACKAGING COMPANY LLC** Employer	**APPEAL 17A-UI-11937-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/22/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 9, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 13, 2017. The claimant participated personally. The employer participated through Amelia Gallagher, hearing representative for Talx UCM Services/Equifax Workforce Solutions. Employer witnesses included Lawrence Trosen, supervisor, and Kelly Schultz, human resources director. Judy Sater, unemployment insurance consultant for Talx UCM Services/Equifax Workforce Solutions, testified on the issue of fact-finding interview participation only. Employer Exhibit 1 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.

ISSUES:
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 pick-and-pull forklift operator and was separated from employment on October 18, 2017, when he was discharged.

The employer has a written policy prohibiting harassing and intimidating conduct. The claimant was made aware of the employer's policy at hire and throughout employment. Most recently, on October 11, 2017, Kelly Schultz visited the employer premises to conduct a meeting about employer behavior related to bullying, negativity and getting along with others. The claimant

attended the staff meeting. The claimant had no prior warnings for similar conduct in nine years of employment. The last warning furnished to the claimant was for attendance in January 2013.

The decision to discharge the claimant was made based on a single incident which occurred on October 17, 2017, with another employee named Mark. The incident occurred through three separate confrontations over a forty minute span, and, each was initiated by Mark to the claimant. Prior to the incident, the claimant had spoken to his co-worker, Mae-Lynn, about logging his orders. He referenced wanting to take his orders from management.

The first time Mark confronted the claimant, he called him a "dick" and a "motherfucker" and the claimant responded by driving away from the confrontation. The claimant then was walking in the hallway where Mark appeared to be pacing, and he stopped the claimant. Mark then referenced that the claimant had upset his co-worker, Mae-Lynn, and again called the claimant a "dick." The third time, the claimant again was walking in the hallway and encountered Mark again; who he felt was "stalking him". Mark again cursed at the claimant, who responded "Iook, I don't know what your problem is." Mark then got into the claimant's face and the claimant responded "are you trying to roll"? By "trying to roll", the claimant meant trying to fight. At that time, another employee, Amber, pulled Mark away from the claimant to separate them. The claimant denied using profanity back, inviting Mark to fight, placing his hands on Mark, or raising his fists. He was subsequently discharged the next day. (Mark was also discharged.)

The employer witnesses did not see the incident unfold and relied upon statements from other employees. No first-hand witness who observed the altercation participated in the hearing. No written statements of any witnesses or from any investigation were furnished for the hearing.

The administrative record reflects that claimant has received unemployment benefits in the amount of $3,185.00, since filing a claim with an effective date of October 22, 2017. The administrative record also establishes that the employer did participate in the November 6, 2017, fact-finding interview. Judy Sater, unemployment insurance consultant for Talx UCM Services/Equifax Workforce Solutions, attended on behalf of the employer. For the fact-finding interview, Ms. Sater provided dates of employment, the date of discharge, reason for discharge, who discharged the claimant, and had no other details available related to the final incident.

REASONINGS AND CONCLUSIONS OF LAW:

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

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).

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.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

This case rests on the credibility of the parties. 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 not 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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. It is true that "[t]he 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). However, the claimant's use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct. See *Nolan v. Emp't Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfiled, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

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. However, the employer has failed to establish by a preponderance of the evidence that the claimant's actions on October 17, 2017 violated the employer's intimidation or harassment policy. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

In this case, the claimant denied making any threats but asked Mark, (who on three occasions approached the claimant with profanity and name calling) if he was trying to roll (fight) in response to Mark getting up near the claimant's face. The administrative law judge is persuaded the claimant's reference of "trying to roll" was a question and not an invitation to fight. The credible evidence presented is that the claimant was repeatedly confronted by a co-worker and took reasonable steps to disengage and deescalate the matter. The claimant's asking Mark what his problem was, and asking if he was "trying to roll" was not a threat or intimidation. Further, the claimant denied any cursing back or touching Mark.

Mr. Trosen, Ms. Schultz, nor any first-hand witness to the confrontation leading to the claimant's discharge participated in the hearing, nor were any written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in the claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant

presented direct, first-hand testimony while the employer relied solely upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The claimant did not engage in threatening, violent or intimidating conduct on October 17, 2017.

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.

Based on the evidence presented, the administrative law judge concludes the employer has failed to establish by a preponderance of the evidence that the claimant was discharged for a final, current act of misconduct. The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges for the employer are moot.

DECISION:

The November 9, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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