IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHASE ELDER Claimant **PIONEER HI BRED INTERNATIONL INC** Employer	**APPEAL 20A-UI-12649-ED-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 6/28/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the October 7, 2020 (reference 02) unemployment insurance decision that denied benefits based upon his discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 28, 2020. Claimant, Chase Elder, participated personally. Claimant was represented by attorney Harley Erbe. Pioneer Hi Bred International Inc was represented by Dan Dehrkoop and Jake Mitag.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a production technician. Claimant's shift varied depending on the season. His immediate supervisor was Steve Brooks. He was employed from October 28, 2019 until June 29, 2020 when he was discharged for failure to meet performance expectations.

The final incident prior to claimant's discharge was on June 25, 2020. Claimant told the employer that the agency employees were "fucking retards". The employer provided no direct witness to the final incident. Claimant self-reported to a team lead that he had a heated discussion with an agency employee and that he told her to "fucking clean up her area." He stated he was frustrated and heated during the incident. Claimant apologized for the incident. The employer provided no direct witnesses to testify regarding the June 25, 2020 incident.

Claimant also self-reported to the team lead that he said if a specific agency employee was a man "I'd fucking hit her in the face." Claimant self-reported that he was trying to joke and didn't mean this to be threatening. The statement was not made in the presence of the co-worker he was referring to.

On March 17, 2020 another incident occurred where claimant was frustrated and threw a seed bag on the pallet bursting the bag open and causing loss of product. On March 25, claimant received a written warning for this incident. Claimant admitted to this incident but stated he did not try to throw the bag with force. Claimant testified that he "put it down with a little too much force and it was a dumb mistake." The employer provided no direct witnesses to this incident.

There was testimony also about a breakroom incident where claimant turned off the television even though several of his co-workers were watching it. Claimant testified that he was tired of the negative political broadcasting, so he just turned off the television. The employer testified there is no policy or rule regarding the use of the break room television.

Claimant did not call the co-worker the profane name while that co-worker was present. Claimant self-reported his use of profane language. Other co-workers have used profane language in the workplace and have not been discharged for their actions.

REASONING AND CONCLUSIONS OF LAW:

As a preliminary matter, I find that the Claimant did not quit. Therefore this must be analyzed as a discharge case.

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.

Further, 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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). 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). 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). Further, 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). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000).

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. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. In this case, the claimant had never been previously warned for any conduct at work.

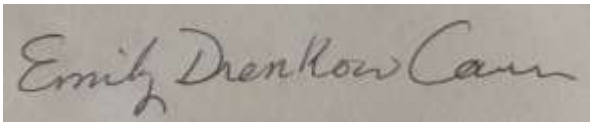
The claimant's action of using profanity in the workplace in response to a co-worker's use of profanity and verbal abuse against him is not misconduct. This act does not constitute a material breach of his duties and obligations arising out of his contract of employment. The fact that it was common place in this warehouse for the employees to use profane language shows that the claimant did not show an intentional and substantial disregard of the employer's interests or of his duties and obligations to his employer.

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.").

Further, the fact that the other employees who were apart of the situation also used profane language towards claimant is still employed amounts to disparate treatment. The employer must enforce respectful treatment amongst co-workers and apply those expectations consistently for each employee. While claimant's conduct might well have justified his termination, the employer has failed to meet its burden of proof establishing disqualifying job misconduct in order to deny benefits. As such, benefits are allowed.

DECISION:

The October 7, 2020 (reference 02) unemployment insurance decision is reversed. Claimant was not discharged from employment for disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.



Emily Drenkow Carr
Administrative Law Judge

February 19, 2021
Decision Dated and Mailed

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