

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ALISHA R MORTON
Claimant

APPEAL NO. 11A-UI-14944-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NELLIS MANAGEMENT COMPANY
Employer

OC: 10/12/08
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated November 8, 2011, reference 03, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on December 13, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing. Michelle Manders participated in the hearing on behalf of the employer. Exhibits One and Two were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a crew chief in the employer's Long John Silver's restaurant from November 22, 2010, to August 29, 2011. The employer's work rules prohibit acting discourteously, unprofessionally, or otherwise inappropriately toward a guest or employee or using profanity or other inappropriate speech in front of guests or employees.

On August 29, 2011, the restaurant was busy and the claimant determined that more food needed to be prepared. The claimant was near the end of her shift and was in the process of counting one of the register drawers. She could not find the cook in the kitchen so she shouted his name. When the cook came back, he told her to shut up and directed profanity toward her. She told him to stop swearing because customers could hear him and it was disrespectful. The cook again told the claimant to shut her mouth. The claimant had experienced problems with the cook before and had complained to the restaurant manager.

The claimant contacted the area manager and told him about what had happened. She told the area manager that she was not going to "take this shit." The area manager instructed the claimant to contact the restaurant manager regarding what had happened. The claimant did as she was instructed and contacted the restaurant manager. She also told a restaurant manager that she was not going to "take this shit" and explained what had happened with a cook. The

claimant's conversations did not take place where customers or other employees could hear her.

After conducting an investigation, the employer discharged the claimant on September 6, 2011, for using curse words in front of customers and team members.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. I believe the claimant's testimony that she did not use profanity in a place where it could be overheard by guests or other team members. I cannot conclude that the claimant's telling her managers that that she was not going to "take this shit" amounts to willful and substantial misconduct under the circumstances involved here.

The claimant has not filed any weekly claims for benefits due to the birth of her child. In order to receive benefits, the claimant will have to reapply and present evidence that she has been released to return to work

DECISION:

The unemployment insurance decision dated November 8, 2011, reference 03, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The claimant will have to reapply and present evidence that she has been released to return to work before receiving benefits in the future.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css