

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHERRY L BIERMANN
913 – 1ST AVE NE
OELWEIN IA 50662

TPI
ATTN GREG BOLLES
155 – 1ST ST S
WINTHROP IA 50682

Appeal Number: 04A-UI-09073-RT
OC: 08-01-04 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, TPI, filed a timely appeal from an unemployment insurance decision dated August 19, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Sherry L. Biermann. After due notice was issued, a telephone hearing was held on September 14, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Greg Bolles, Human Resources Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time finishing operator from June 25, 2004 until she was discharged on July 15, 2004. The claimant was discharged when she got into a verbal confrontation with a coworker on July 15, 2004. The claimant used vulgar and profane language directed at the coworker, including the word "fuck." The claimant was the instigator of this verbal confrontation. The claimant had received no warnings or disciplines for this behavior. The employer has a policy at Article Six, section One, Number Five of its union contract, prohibiting insulting or abusive language and the claimant got a copy of this document. There were no other reasons for the claimant's discharge. Pursuant to her claim for unemployment insurance benefits filed effective August 1, 2004, the claimant has received no unemployment insurance benefits; records showing no payments or weekly claims. The claimant is shown as being overpaid \$1,192.00 from 2000.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not because she has received no such benefits since separating from the employer.

Iowa Code section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer's witness, Greg Bolles, Human Resources Manager, credibly testified, and the administrative law judge concludes, that the claimant was discharged on July 15, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Mr. Bolles credibly testified that on July 15, 2004, the claimant entered into a verbal confrontation with a coworker, using vulgar and profane language directed at the coworker, including the word "fuck." The claimant was the instigator of this confrontation. Mr. Bolles also testified that this is in clear violation of the employer's policy contained in its union contract prohibiting insulting or abusive language. The claimant got a copy of this document. Because of the employer's policy and the severity of the claimant's offense, the administrative law judge concludes that the claimant's confrontation was a deliberate act constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of an employer's interest and is disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734 (Iowa App. 1990), the Iowa Court of Appeals provided that 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. Here, the claimant used profanity in a clearly confrontational or disrespectful manner and the target of abusive name-calling was present. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until and unless she requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received no unemployment insurance benefits since separating from the employer herein on or about July 15, 2004 and filing for such benefits effective August 1, 2004. Accordingly, the administrative law judge concludes that the claimant is not overpaid any such benefits because she has received none. Workforce Development records do show that the claimant is overpaid unemployment insurance benefits in the amount of \$1,192.00 from 2000.

DECISION:

The representative's decision dated August 19, 2004, reference 01, is reversed. The claimant, Sherry L. Biermann, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. Since she has received no unemployment insurance benefits, she is not overpaid any such benefits since separating from the employer herein. However, records indicate that the claimant is overpaid unemployment insurance benefits in the amount of \$1,192.00 from 2000.

b/tjc