

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN J KULL
Claimant

APPEAL NO. 11A-UI-15345-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HAMBURG INN NO. 2 INC
Employer

**OC: 10/30/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 18, 2011, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on December 21, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing with his attorney, Patrick Waldron. Elizabeth Sanders participated in the hearing on behalf of the employer with a witness, Seth Dudley. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a restaurant server from September 6, 2010, to October 30, 2011.

On July 29, 2011, after the claimant finished serving his last table at the end of his shift, he left work immediately without checking with his supervisor. He jokingly told a new employee when he was leaving that he was quitting. The next day, the claimant reported to work and was counseled by his supervisor. He was to apologize to the new employee about his comment about quitting and he did.

On October 30, 2011, the claimant approached a female customer sitting at the counter and sat down in the chair next to her. He asked the woman, "What can I get you lady?" The customer took offense at his comment and probably misheard what he was said and though he said "baby" instead of "lady." The claimant apologized to her and later again told her again that he was sorry when he stopped at the counter.

The customer complained to the supervisor that the claimant had called her baby and then repeatedly apologized, which made her uncomfortable. She complained that he had interrupted her while she was on the phone and invaded her personal space. She said she lost her

appetite and wanted to leave because she was so upset. The supervisor gave her a complimentary meal to appease her.

The supervisor approached the claimant about the customer complaint. The claimant told the supervisor the customer was a lying bitch. The supervisor told the claimant that he thought the claimant was drunk, that he had upset a customer, and that he needed to leave. The claimant denied that he had been drinking. The claimant punched out and the supervisor followed him outside and asked him what was going on and whether he had been drinking. The claimant responded something to the effect, "what do you want me to say? yeah, I've been drinking all night and plan to go get into a fight with some guys." The claimant was being sarcastic and was not serious. He had not been drinking.

The claimant's conduct was reported to the restaurant manager, and on October 30, 2011, the employer discharged the claimant based on his conduct on October 29, 2011, and considering his past conduct in July 2011.

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 the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant testified credibly and the employer's evidence about the interaction with the customer was hearsay. I do not believe the claimant called the customer "baby" but believe it is quite possible the customer misheard what he said and was offended. Calling a female customer "lady" does not amount to misconduct. I do not consider the claimant's efforts afterward to apologize to be a will act of misconduct. I do not believe the claimant admitted to drinking or being under the influence of alcohol. I believe he was making a sarcastic comment, which was probably a foolish tactic but was not misconduct.

DECISION:

The unemployment insurance decision dated November 18, 2011, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs