

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J SCHMITZ
Claimant

APPEAL NO. 08A-UI-02376-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FMC/MARC INC
ARBIES
Employer

OC: 02/03/08 R: 01
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Arbies (employer) appealed a representative's February 28, 2008 decision (reference 01) that concluded Robert Schmitz (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 25, 2008. The claimant participated personally. The employer was represented by Joshua Burrows, Attorney at Law, and participated by Jessie Nieland, Unit Director.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on April 17, 2006, as a part-time crew trainer. The employer verbally warned the claimant regarding his poor attitude. On October 24, 2007, the employer verbally warned and then issued the claimant a written warning for grabbing roast beef without wearing gloves or washing his hands. On December 11, 2007, the employer issued the claimant a written warning regarding the claimant's repeated tardiness. The employer notified the claimant that further infractions could result in termination from employment.

On January 25, 2008, the employer was busy. The claimant was supposed to throw prepared sandwiches up into a shoot. The claimant was throwing them so hard that they were flipping out of the shoot. He threw a salad very hard and the unit director had to put her hand in the shoot to keep it from flying out. The unit director asked the claimant if she could get into the fry freezer. The claimant moved only slightly out of the way and then pushed on the door slamming the unit directors arm inside. The unit director told the claimant to leave, as he was fired.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for misconduct.

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 Department of Job Service, 391 N.W.2d 731 (Iowa App. 1986). Repeated unintentionally careless behavior of claimant towards subordinates and others, after repeated warnings, is misconduct. Greene v. Employment Appeal Board, 426 N.W.2d 659 (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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant indicates his behavior was due to carelessness induced by busyness. The claimant's carelessness showed a deliberate disregard for the employer, as he threw food so hard it was flying out of the shoot and he slammed his supervisor's arm in the freezer. The claimant had a previous history of carelessness and warnings about his attendance and touching food without washing or wearing gloves. The claimant's carelessness indicates a wrongful intent. He is not eligible to receive unemployment insurance 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 claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's February 28, 2008 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits, because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$854.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw