

**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**

**CHRISTINE N HOLECEK  
APT B4  
2451 PLEASEANTVIEW DR  
MARION IA 52302**

**MIRAGE PROPERTIES CORPORATION  
999 – 44<sup>TH</sup> ST STE 1000  
MARION IA 52302-3846**

**Appeal Number: 05A-UI-08039-DT  
OC: 07/10/05 R: 03  
Claimant: Respondent (1)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge  
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Mirage Properties Corporation (claimant) appealed a representative's August 2, 2005 decision (reference 03) that concluded Christine N. Holecek (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 23, 2005. The claimant participated in the hearing. Rita Vasser appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 26, 2005. She worked part time (approximately 30 hours per week) as a leasing agent at two of the employer's apartment complex properties. Her last day of work was July 9, 2005. The employer discharged her on that date. The reason asserted for the discharge was starting rumors and discontent, and calling fellow employees and a tenant vulgar names.

The employer asserted that in mid-June 2005, the claimant had told a coworker that one of the employer's complexes was up for sale. The claimant acknowledged that she had done so, indicating that her father was the interested buyer, and that he had found a listing for the complex on a website. The claimant's supervisor had inquired of her as to her source of information, and she provided it to him, but she was never counseled or warned that she should not be spreading that kind of information.

The employer asserted that also in mid-June 2005, the claimant had told a tenant or prospective tenant that one of the employer's managers was going to be fired. The claimant denied saying anything to anyone about that manager. Also in mid-June 2005, the employer asserted that the claimant had told one office person that another office person had called the first person a "b - - - -" and then had told another office person that the first person was a "b - - - -." The claimant acknowledged that in a private home setting she had told the first person that the second person had some problems with her and they should work them out, but she denied calling anyone a "b - - - -."

Finally, the employer asserted that later than mid-June 2005, the claimant had called a tenant a "f - - - ing a - - - - -." The claimant denied ever calling anyone connected with the employer or a tenant a "f - - - ing a - - - - -." She indicated the only time that language came up was that on or about June 30, 2005 she was putting up signs and a tenant accosted her, calling her a "f - - - ing a - - - - -" and other names while throwing cigarette butts and such at her, and that she later told her manager about what had happened.

The claimant established an unemployment insurance benefit year effective July 10, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the allegations that she had spread rumors and used vulgar names against employees and tenants. However, while admitting that she had told a coworker she had learned one of the employer's complexes was "on the market," the claimant denied the remainder of the allegations. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from other employees; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the employees might have been mistaken, whether they actually heard or observed the entire incident, whether they are credible, or whether the employer's witnesses might have misinterpreted or misunderstood aspects of their reports. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible.

Further, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The most recent incident in question occurred about nine days prior to the employer's discharge of the claimant. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code section 96.19-3. The claimant's base period began April 1, 2005 and ended March 31, 2005. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's August 2, 2005 decision (reference 03) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/pjs