

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHARLES D EICHACKER**

Claimant

**APPEAL NO. 11A-UI-01747-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BEST WESTERN LONGBRANCH INN**

Employer

**OC: 10/31/10**

**Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Longbranch, filed an appeal from a decision dated February 11, 2011, reference 01. The decision allowed benefits to the claimant, Charles Eichacker. After due notice was issued, a hearing was held by telephone conference call on March 14, 2011. The claimant participated on his own behalf. The employer participated by CFO Douglas DeLong. Exhibits One and Two were admitted into the record.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Charles Eichacker was employed by Longbranch from March 16, 2010 until November 3, 2010 as a full-time cook. He had received two warnings in July 2010, for absenteeism. Company policy calls for discharge of any employee who receives three written warnings in a 12-month period.

On October 21, 2010, Kitchen Supervisor Donna Perez told Chef Kevin Riddle that on October 15, 2010, the claimant had been insubordinate and rude to her, "screaming" at her and using "foul language" when she asked him why he had not been at the carving table as assigned. Mr. Riddle did not consult with CFO Douglas DeLong until October 27, 2010, who wanted to consult with the company lawyer first because the claimant was at that time on workers compensation. He gave the approval for discharge on November 3, 2010, and the claimant was fired by Mr. Riddle on that date, when the third written warning was issued.

The claimant was not interviewed to gather his side of the story before the decision to discharge was made. At the time of discharged he denied using foul language. He stated Ms. Perez had asked him why he was not at the carving table as assigned and he said he "had a damned good reason," because he was washing the carving knife which was full of grease.

## REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Longbranch has asserted the claimant was insubordinate and used foul language to a supervisor, but did not present testimony from Ms. Perez who was the only eye witness to the event. The claimant denied being insubordinate but only answered the supervisor's question by saying he had a "damned good reason" for being gone, which was to wash his knife.

There has been no adequate explanation as to why the claimant was fired 19 days after the alleged final incident. Under the provisions of the above Administrative Code section, disqualification may not be imposed for a discharge unless there is a current, final act of misconduct.

In addition, if a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

**DECISION:**

The representative's decision of February 11, 2010, reference 01, is affirmed. Charles Eichacker is qualified for benefits provided he is otherwise eligible.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

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