

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TODD A SHERMAN**  
Claimant

**APPEAL NO. 11A-UI-15517-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BUCCANEERS HOCKEY LLC**  
Employer

**OC: 11/06/11**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated November 28, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 30, 2011. Claimant participated. Employer participated by Renee Peled, manager. Cherie Carton was a witness for the employer. The record consists of the testimony of Renee Peled; the testimony of Cherie Carton; the testimony of Todd Sherman; and Employer's Exhibits 1 through 4.

**ISSUES:**

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is an ice arena and junior ice hockey team located in Urbandale, Iowa. The claimant worked for the prior owners in maintenance. On November 28, 2009, he began working for the new owners both in maintenance and as a beer runner. A beer runner is responsible for moving and tapping kegs and otherwise assisting the bartenders. The claimant's work was both seasonal and part-time. The season runs from October through March or early April and while the season runs, the claimant has part time hours. His last day of work was November 4, 2011. He was terminated on November 4, 2011.

The events that led to the claimant's termination occurred on November 4, 2011. The claimant was working a game that night and was asked by one of the bartenders to remove one type of beer and tap a different brand. The claimant refused and the bartender called Cherie Carton, the concession manager, for assistance. Ms. Carton told the claimant to tap the new brand and the claimant became angry. Ms. Carton left to see her daughter in the hospital.

Ms. Carton returned at approximately 8:30 p.m. and was informed by the bartenders that the claimant had not been available by radio and that they had run out of beer. The claimant then came to the office. He was very angry. He called one of the bartenders "a total bitch" and made reference to someone's "fucking son." His voice was high and he was agitated. He then threw his keys directly at Ms. Carton. This frightened her. The claimant left the office to take down an area called West Portable. He was throwing things. Ms. Carton followed the claimant and tried to get his attention. She finally told him that he was fired and he needed to leave immediately. The claimant then went to the maintenance office and returned his keys.

## **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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in

which the target of the statements is no present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). Threats of violence or acts of violence may also constitute misconduct. In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The greater weight of the evidence established that the claimant breached his duty of civility and geniality through multiple instances of inappropriate conduct on November 4, 2011. He used vulgar and profane language when describing his co-workers. He threw his keys at the concession manager, which could reasonably be viewed as a violent act. His demeanor and tone of voice frightened the concession manager. Whatever frustrations the claimant may have experienced on November 4, 2011, does not justify his actions. The employer has established misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the Claims Section for determination.

**DECISION:**

The representative's decision dated November 28, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw