

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

TIMOTHY D DIAZ  
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PAPETTI'S OF IOWA  
C/o ADP UNEMPLOYMENT GROUP UC  
EXPRESS  
PO BOX 66744  
ST LOUIS MO 63166-6744

Appeal Number: 06A-UI-01442-RT  
OC: 01-01-06 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 for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Papetti's of Iowa, filed a timely appeal from an unemployment insurance decision dated January 26, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Timothy D. Diaz. After due notice was issued, a telephone hearing was held on February 23, 2006, with the claimant participating. The claimant was represented by his father, Daniel Diaz. David Drees, Second Shift Production Manager, and Beverly Lawrence, Human Resources Representative, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time Pre-cook Operator II from August 20, 2004, until he was discharged on December 30, 2005. The claimant was suspended on December 27, 2005. The claimant's suspension and discharge were because the claimant walked off the job on December 23, 2005, leaving a note containing an obscene word, as shown at Employer's Exhibit Two. The employer has a policy in its rules of conduct, which is contained in the employee's handbook, prohibiting, among other things, walking off the job and obscene or abusive language. The claimant received a copy of the handbook and signed an acknowledgment therefore, also as shown at Employer's Exhibit One. The claimant had received no relevant warnings or disciplines.

On December 23, 2005, although not a "lead," the claimant was filling in for a "lead" and was wearing a green hat, indicating that he was acting as a "lead." The claimant had permission to wear the green hat from both his mother, Lou Ann Diaz, who worked for the employer as a "lead" and David Drees, Second Shift Production Manager and one of the employer's witnesses. Two co-workers had exchanges with the claimant about his wearing the green hat. One co-worker asked the claimant why he was wearing a green hat and the claimant responded that he was a lead. The claimant was then asked where. The claimant said over where he worked referring to the east side. The claimant indicated that he was filling in for the lead. The employee then said, "So you are wearing a green hat but that is fucking stupid." This made the claimant feel extremely upset. Just a couple of minutes later a second co-worker came over and had another exchange with the claimant. This co-worker told the claimant, "Man they give the green hat to anyone." The claimant responded "only the best." The employee then said "yeah, right." This further upset the claimant to the extent that he decided to walk off the job early before his shift was over and he did so. The claimant also left a note, as shown at Employer's Exhibit Two. The claimant wrote the note because he was upset over the way that he had been treated by the two co-workers and the statements made to him by the two co-workers. Pursuant to his claim for unemployment insurance benefits filed effective January 1, 2006, the claimant has received unemployment insurance benefits in the amount of \$2,359.00 as follows: \$337.00 per week for seven weeks from benefit week ending January 7, 2006 to benefit week ending February 18, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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).

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The parties agree, and the administrative law judge concludes, that the claimant was initially suspended on December 27, 2005, and then discharged on December 30, 2005. When the reason for unemployment is a result of a disciplinary lay-off or suspension imposed by the employer the claimant is considered as discharged and the issue of misconduct must be resolved. Accordingly, the administrative law judge concludes that the claimant was effectively discharged on December 27, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

There is really very little disagreement between the parties as to the facts. On December 23, 2005, the claimant walked off the job before his shift was over and left a note, as shown at

Employer's Exhibit Two, containing an obscene word. The employer has policies, as shown at Employer's Exhibit One, prohibiting walking off the job and further prohibiting obscene or abusive language. The claimant walked off the job leaving the note because on December 23, 2005, he was acting as a substitute "lead," which allowed him to wear a green hat. He was given permission to do so by his mother, Lou Ann Diaz, who worked at the employer as a "lead," and by the employer's witness, David Drees, Second Shift Production Manager. The claimant is not ordinarily a "lead." He was merely substituting on the day in question. The claimant was subjected to exchanges with two co-workers over the green hat. These exchanges are set out in the Findings of Fact. During one of the exchanges, the employee stated that the claimant's wearing of the green hat was "fucking stupid." The claimant became significantly upset over these comments and left work early, leaving the note.

Based upon the record here and the circumstances precipitating the claimant's leaving the note and walking off the job, the administrative law judge is constrained to conclude that the claimant's acts were not deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor do they evince a willful or wanton disregard of an employer's interests and therefore are not disqualifying misconduct for those reasons. The claimant was extremely upset with cause because of the comments made to him. The administrative law judge is also not unmindful that the claimant's mother also worked for the employer and was a lead and had the authority to wear a green hat. The administrative law judge in no way condones the use of profane language especially the words used here but must conclude that the claimant did not first use the language and when he did he was very upset. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of the abusive name calling is not present. The Court of Appeals went on to state that the question of whether the use of improper language in the workplace is misconduct is merely always a fact question to be considered with other relevant factors including the context in which it is said and the general work environment. Considering the context in which the claimant's language was used in the note, and the other circumstances surrounding the incident, the administrative law judge is constrained to conclude that the claimant's behavior was not disqualifying misconduct. If the claimant's behavior was disqualifying misconduct, so would be the behavior of the first co-worker who used the same language directed at the claimant. The administrative law judge does conclude that the claimant's use of the language and walking off the job was negligent, and the issue then becomes whether the claimant's acts were recurring negligence sufficient to establish disqualifying misconduct.

On the record here, the administrative law judge is constrained to conclude that the claimant's acts in walking off the job and leaving the note are not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant had received no relevant warnings or disciplines. The claimant was justifiably upset over the language used at him. Therefore, the administrative law judge concludes the claimant's acts were merely ordinary negligence in isolated instances and are not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes

there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,359.00 since separating from the employer herein on or about December 27, 2005, and filing for such benefits effective January 1, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

#### DECISION:

The representative's decision of January 26, 2006, reference 01, is affirmed. The claimant, Timothy D. Diaz, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw