

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA RUIZ
Claimant

APPEAL NO. 09A-UI-15756-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES LLC
Employer

**Original Claim: 09/27/09
Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated October 16, 2009, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on January 6, 2010 in Davenport, Iowa. The claimant participated. The employer participated by Karen Hamm, pit manager table games; Jamie Briesch, employee relations supervisor; Tammy Kadlec human resources manager; and Harold Mire, Jr., table games manager. The record consists of the testimony of the following witnesses: Karen Hamm; Jamie Briesch; Tammy Kadlec; Harold Mire, Jr.; and Patricia Ruiz. The record also contains Claimant's Exhibits A through H and Employer's Exhibits 1 through 6.

ISSUE:

Whether the claimant was discharged for misconduct.

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 in this case owns and operates the Isle of Capri Casino in Bettendorf, Iowa. The claimant was hired on April 18, 1995, as a full-time dealer. She was notified on September 28, 2009, that she was terminated and the termination was effective on September 29, 2009. The claimant was terminated due to a violation of the employer's policy on rudeness to internal guests. Internal guest is the phrase used by the employer to describe co-employees.

The incident that led to the claimant's termination occurred on September 24, 2009. Two employees—Judy Jensen and Nicole Thomas—were having a private conversation at the workplace. The topic of that conversation was Judy's daughter's boyfriend. The claimant interjected herself into the conversation and asked Judy this question: "Is this one black too?" Both Judy and Nicole were offended by this comment. The claimant went on to observe that the daughter should pick a guy from a higher class.

Karen Hamm, who was serving as pit manager for the table games, became aware of the statements made by the claimant and that she had offended her two co-workers. Ms. Hamm took statements from the co-workers and in turn forwarded those statements to Tammy Kadlec, the human resources manager. The decision was made to suspend the claimant pending further investigation. The suspension took place on September 26, 2009.

Ms. Kadlec met with the claimant on September 26, 2009. The claimant denied being racist and said that she felt that Judy's daughter needs to find a different pot to pick her boyfriends from. The employer decided to terminate the claimant's employment because she had placed herself in the middle of a conversation that she was not a part of and then made inappropriate comments that offended two of her coworkers.

The claimant had been previously counseled concerning inappropriate statements to co-workers. On March 21, 2009, the claimant and another employee, Liz, had been involved in an incident that happened on the casino floor. Harold Mire, table games manager, had spoken to both employees and told them that their dispute was not going to be tolerated. As the claimant left the meeting, she said to Liz: "Are you sure you've been taking your medication?" Mr. Mire told the claimant that this comment was unacceptable. He then asked Ms. Kadlec to come to his office and explain to the claimant why she could not say these things, as he did not feel that he was getting through to the claimant. The claimant told Ms. Kadlec that Liz was bipolar and that Liz constantly talked about her medical condition and everyone knew about it. Ms. Kadlec said that she personally did not know this about Liz and that it was not the claimant's place to discuss it or make comments to Liz about her medical condition. The claimant felt that what she said was acceptable. The claimant was told that she could not say these things and that this type of behavior was not acceptable at work. The claimant was given a suspension and told that future occurrences might lead to termination. The suspension was issued on March 28, 2009, and a written performance document was prepared. (Employer's Exhibit 1)

The claimant's performance reviews show that she was knowledgeable about her job and that the quality and quantity of her work was average or above average. The performance reviews also show that the claimant was below expectations on her relationships with co-workers and a note was made that she made rude and inappropriate comments to her co-employees.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts and omissions that constitute a material breach of the duty a worker owes to the employer. 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 not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). An employer has the right to expect decency and civility from its workers. See Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1990). Although the definition of misconduct in 871 IAC 24.32(1) excludes "good faith errors in judgment or discretion," a claimant's subjective understanding and intent are not the end of the analysis. "The key question is what a reasonable person would have believed under the circumstances." See Aalbers v. IDJS, 431 N.W.2d 330, 335-336 (Iowa 1988).

This case presents a difficult issue in that the claimant was discharged for rude behavior and inappropriate comments to co-workers. Rude behavior, i.e., what might be considered by an individual as "rude," is a subjective standard in some ways. For example, a worker who is under stress to complete a task and gets interrupted, might say something to the person who interrupted her that would be considered rude by some people and not by others. A single instance of rude behavior probably would not be misconduct.

The claimant did not believe that any of the things she said to her co-workers were "inappropriate or rude." Ms. Kadlec and Mr. Mire both observed that the claimant "didn't get it", i.e., she did not seem to understand that what she said was not acceptable in the workplace. The critical question, however, is not what the claimant's subjective understanding and intent were, but rather what a reasonable person would have believed under the circumstances. The claimant's comments concerning the race of the daughter's boyfriend and the daughter's choice of boyfriend would be inappropriate and rude from the standpoint of a reasonable person. There is an unfortunate pattern of these types of comments from the claimant. She might not understand or believe that what she said was wrong, but the employer has shown that it counseled the claimant on several occasions on what was inappropriate and why. The claimant's comments were offensive and she was on notice from her employer that should these comments continue she would be terminated. The employer has shown misconduct. Benefits are denied.

DECISION:

The representative's decision dated October 16, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times herweekly benefit amount, provided she is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw