

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ORVILLE L MOORE
Claimant

APPEAL NO. 11A-UI-06931-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

C & I INC
Employer

**OC: 04/24/11
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated May 18, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 22, 2011. Claimant participated. Employer participated by Craig Olson, owner, and Amber Schlangen, manager. The record consists of the testimony of Craig Olson; the testimony of Amber Schlangen; and the testimony of Orville Moore.

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 operates several Subway restaurants in Pella, Iowa, and Monroe, Iowa. The claimant worked at a restaurant located in Pella. The claimant was hired on May 20, 2010, as a part-time sandwich artist. His last day of work was April 27, 2011. He was terminated on April 27, 2011.

The incident that led to the claimant's termination occurred on April 27, 2011. The claimant did not like the owner—Craig Olson. The claimant felt that Mr. Olson was not responsive to his questions and that Mr. Olson would not help out at the store when the store was busy. The claimant cited an example of where Mr. Olson would not find some cookie sleeves that were used to package cookies for sale. He would say that he was "too busy", which the claimant deemed to be unprofessional.

On April 27, 2011, the claimant got into a conversation with a customer who was ordering a sandwich. The claimant described Mr. Olson in a derogatory manner, using profanity. He called Mr. Olson a "fucking asshole" and said that he was going to punch Mr. Olson in his "fucking head." He said he "didn't get paid for this shit." The customer asked Amber Schlangen to make

the sandwich since the claimant seemed so angry. She did so. Ms. Schlangen took the claimant aside and told him to stop the comments immediately. The claimant said he would stop.

The comments persisted. The claimant continued to make derogatory comments about the owner. He called him an "SOB" who did not answer questions asked by employees. Another employee contacted Mr. Olson. Mr. Olson called Amber Schlangen and told her to terminate the claimant.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 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). 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 in this case established that the claimant did indeed use profane and unprofessional language with both customers and co-workers while working on

April 27, 2011. The claimant was apparently angry because earlier in the week he had asked the owner, Craig Olson, some questions, and those questions were not answered to his satisfaction. The claimant vented his feelings by making comments about Mr. Olson that included calling him a "fucking asshole" and threatening to punch him in the head. Mr. Olson was concerned enough about the claimant's comments that he asked the police to talk to Mr. Moore. Although Mr. Moore denied making these statements, this testimony is not credible. Ms. Schlangen said that the claimant's comments disturbed a customer, who then asked Ms. Schlangen to make her sandwich because the claimant seemed so angry. This testimony corroborates the claimant's state of mind that morning. He admitted that he had problems with Mr. Olson. The most reasonable inference from the testimony is that the claimant could not and would not let go of his anger toward Mr. Olson and that he expressed his anger with profane and threatening language. This is misconduct. Benefits are denied.

DECISION:

The decision of the representative dated May 18, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs