

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID WINSTON
Claimant

APPEAL NO. 11A-UI-02786-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

INDEPENDENCE RANCH INC
Employer

**OC: 12/26/10
Claimant: Respondent (2R)**

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated February 24, 2011, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 30, 2011. Claimant participated. Employer participated by Michelle Snyder, general manager. Denny Stammer was a witness for the employer. The record consists of the testimony of Michelle Snyder; the testimony of David Winston; and the testimony of Denny Stammer.

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 a Pizza Ranch restaurant located in Independence, Iowa. The claimant was initially hired on June 21, 2008. He left his employment for a short time and then returned to work. He was a part-time chicken cooker. His last day of work was December 26, 2010. He was terminated on January 3, 2011.

The incident that led to the claimant's termination occurred on December 26, 2010. The claimant had made a mess in his work area. A manager asked the claimant to clean up the area and the claimant refused. He told the manager that she "could clean it up." He then clocked out and left the restaurant without permission.

On December 11, 2010, the claimant was told to check his chicken thighs as there was concern that the thighs were not being cooked enough. The claimant refused to check and told the manager that she could do it herself. He clocked out and went home.

The claimant had received a suspension following an incident on July 10, 2010. Michelle Snyder noticed that there was not enough breaded chicken for the shift. The claimant got angry and yelled at Ms. Snyder. The claimant was told to clock out and go home. He was told that if another incident occurred, he would be terminated.

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.

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 that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the

worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to establish misconduct.

The evidence in this case showed that the claimant was insubordinate on December 26, 2010. He refused to clean up his work area when asked by the employer and then left the work site without permission. The claimant testified this incident did not occur but an eyewitness confirmed that the incident did indeed occur.

The claimant had been insubordinate in the past. On December 11, 2010, he refused to check whether his chicken thighs had been completely cooked. He told a manager she could check for herself. He was suspended back on July 10, 2010, for getting into an argument with the general manager. He was told that if there were further incidents he could be terminated.

An employer can reasonably expect that an employee will follow instructions from management. The employer's requests to the claimant were entirely reasonable. The claimant tried to justify his refusals by either denying they did not occur or his unwillingness to take instructions from female managers because of their "moods." The claimant breached his duty to his employer and the fact that his managers were women is no excuse. Since misconduct has been established, benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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 decision of the representative dated February 24, 2011, reference 02, is reversed. 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. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs