

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THEODORE R PREHM
Claimant

APPEAL NO. 07A-UI-11227-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NPC INTERNATIONAL INC
PIZZA HUT**
Employer

**OC: 11/04/07 R: 02
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

NPC International, Inc., doing business as Pizza Hut, filed a timely appeal from the November 27, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 19, 2007. Claimant Theodore Prehm participated. Kimberly Feeney, General Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Theodore Prehm was employed by Pizza Hut as a full-time shift manager from July 2006 until October 29, 2007, when Kimberly Feeney, General Manager, discharged him. Ms. Feeney and Assistant Manager Jessica Potts functioned as Mr. Prehm's immediate supervisors.

The incident that prompted the discharge occurred on October 28, 2007. Mr. Prehm arrived for work at 5:00 p.m. and the restaurant was already busy. Assistant Manager Jessica Potts was also at the workplace. General Manager Kimberly Feeney was off work. The restaurant continued to be busy. Mr. Prehm was assisting the cooks. Ms. Potts criticized Mr. Prehm for low sales figures and told him he was responsible for food orders taking too long. Mr. Prehm pointed out that orders were already backed when he arrived. There continued to be interpersonal conflict between Ms. Potts and Mr. Prehm throughout the shift until Ms. Potts left. At approximately 6:30 p.m., Mr. Prehm telephoned General Manager Kimberly Feeney to discuss the evening's business, including the sales figures and order times. A short while later, Ms. Potts telephoned Ms. Feeney. Ms. Potts told Ms. Feeney that she and Mr. Prehm were not getting along. Ms. Potts told Ms. Feeney that Mr. Prehm had called her a "fucking bitch" and had "flipped her off." Ms. Potts called Ms. Feeney a couple more times during the evening to

discuss additional restaurant matters other than the situation with Mr. Prehm. The restaurant was still busy when Ms. Potts left. Other employees reached the end of their scheduled shift and were allowed to depart to keep labor costs down. The restaurant continued to be busy.

On October 29, Ms. Feeney and Ms. Potts discussed the events of the previous day. Ms. Potts told Ms. Feeney that Mr. Prehm had been directing profanity toward the rest of the staff and otherwise being disrespectful to the staff. No other staff had complained to Ms. Feeney. Ms. Potts told Ms. Feeney that Mr. Prehm's conduct had occurred in the presence of customers. Ms. Feeney decided to discharge Mr. Prehm from the employment. Ms. Feeney contacted Mr. Prehm to have him come in for a meeting prior to his next shift. Mr. Prehm asked whether he was being terminated. Ms. Feeney told Mr. Prehm that was the probably outcome of the meeting. Mr. Prehm declined to appear for the meeting and Ms. Feeney told him he was discharged from the employment.

Mr. Prehm established a claim for benefits that was effective November 4, 2007 and has received benefits totaling \$1,100.00.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits.

Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

Despite the employer's failure to present testimony from Ms. Potts, the greater weight of the evidence indicates that Mr. Prehm did in fact make the profane comment Ms. Potts attributed to him and did in fact make the offensive gesture Ms. Potts attributed to him. Mr. Prehm's response to the request that he come in for a meeting to discuss the incident is telling. Mr. Prehm's question for Ms. Feeney as to whether he was being discharged suggests Mr. Prehm was aware of some conduct or incident that might provide a basis for discipline. The evidence indicates that Ms. Potts contacted Ms. Feeney very close in time to the actual incident, perhaps within minutes, and provided the details of Mr. Prehm's conduct. Mr. Prehm's questions for the employer are also telling. Mr. Prehm's questions and testimony emphasized that the employer had a policy for dealing with offensive behavior, that Ms. Potts did not invoke the policy against him on October 28, and that therefore the offensive conduct could not have taken place. This line of questioning and the related testimony also suggest that the offensive conduct occurred, but that Mr. Prehm wants to minimize the seriousness of the matter. The evidence in the record persuades the administrative law judge that Mr. Prehm did in fact direct profane language and an offensive gesture toward his immediate supervisor in an attempt to undermine her authority.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Prehm was discharged for misconduct. Accordingly, Mr. Prehm is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Prehm.

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.

Because Mr. Prehm has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Prehm must repay. Mr. Prehm is overpaid \$1,100.00.

DECISION:

The Agency representative's November 27, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$1,100.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw