

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EUNICE F MOSER

Claimant

APPEAL NO. 10A-UI-15812-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE CANTEEN LUNCH INC

Employer

OC: 10/10/10

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated November 10, 2010, reference 05, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 30, 2010. The employer participated by Shirley McBeth, owner. Tasha Watson was a witness for the employer. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Shirley McBeth and the testimony of Tasha Watson.

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 small coffee shop located in Ottumwa, Iowa. The restaurant has been located in the same location since 1936 and has a long tradition. There are only 17 stools in the restaurant. The claimant was hired as a part time waitress. She worked for the employer for only a short period of time. She was terminated on September 10, 2010.

The incident that led to the claimant's termination occurred on or about September 9, 2010. The claimant worked from 4:00 p.m. to 8:00 p.m. The claimant's husband often came into the restaurant and the claimant spent most of her working time talking to him. That evening, the claimant and her husband got into a loud argument and the claimant used the F word. Two elderly ladies were customers that evening and they made a complaint to the owner, Shirley McBeth. The incident was witnessed by Tasha Watson, another waitress.

Ms. McBeth had previously spoken to the claimant about her use of profanity after complaints from Ms. Watson and other employees. Ms. McBeth called the claimant after she received the complaint from the customers. She terminated the claimant for use of profanity.

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 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 evidence established that the claimant habitually used profanity while in the workplace and that co-workers had complained to the owner, Ms. McBeth, about the claimant's language. Ms. McBeth spoke to the claimant and told her that this type of language was not acceptable. The restaurant had been a landmark in Ottumwa for many years and served a wide variety of clientele, both from Ottumwa and elsewhere. The restaurant was small and everything could be heard by customers.

The claimant's husband came into the restaurant and on the night before the claimant's termination an argument ensued between the claimant and her husband that resulted in the use of profanity. This language offended not only Ms. Watson, the other waitress, present, but two customers. The customers made a complaint to Ms. McBeth. The claimant's use of totally inappropriate language in the restaurant breaches a material duty owed by her to the employer. She knew this type of language was unacceptable, as she had been warned previously by the employer. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 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 representative's decision dated November 10, 2010, reference 05, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided the 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/kjw