

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**PENNY L HARRIS
1517 E 19TH ST
DES MOINES IA 50316**

**VILLAGE INN/BAKERS SQUARE –
VICORP RESTAURANT
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000**

**Appeal Number: 04A-UI-07677-DWT
OC: 11/02/03 R: 02
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal are based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Village Inn/Baker's Square-Vicorp Restaurant (employer) appealed a representative's July 6, 2004 decision (reference 02) that concluded Penny L. Harris (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the employer discharged the claimant for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 10, 2004. The claimant participated in the hearing. Marcy Schneider, a representative with Employers Unity, Inc., appeared on the employer's behalf with Jami Busch, the general manager, as a witness. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer 1986. Since July 1990, he worked as a full-time cook for the employer. His supervisor was Busch and the assistant managers.

In November 2003, the employer cut hours for all cooks. The claimant was not happy with the reduction in hours, but continued his employment. On January 29, 2004, the employer gave the claimant a written warning for failing to follow his supervisor's instructions. Specifically, the claimant talked on his cell phone on January 25 when he was working even though Busch asked him more than once to put his cell phone away that morning. The employer allowed employees to use cell phones on their breaks, not while they were working. On January 27, an assistant told the claimant to do some cleaning. Instead of following his supervisor's instructions, the claimant was observed smashing taco shells with a skillet. The January 29, 2004 warning informed the claimant that if he did not start following management's instructions, he could be discharged. After receiving the written warning, the claimant understood his job was in jeopardy if he did not follow directions.

On June 15, 2004, the claimant and a server engaged in a verbal confrontation at work. The assistant manager on duty told them both to stop and to be quiet. The server followed this instruction. The claimant stopped arguing with the server but he then made remarks about how he hated working for the employer and the people who worked for the employer. A customer heard the claimant's remarks and told the employer that if he were the employer he would not allow this type of conduct from an employee. Busch learned about the incident and the customer's remarks on June 15.

The day before, June 14, Busch talked to the claimant about verbally harassing servers. Busch heard the claimant make derogatory remarks about servers and told him this type of comment was unprofessional and would not be tolerated by the employer.

On June 16, the employer discharged the claimant for again failing to follow management's instructions, to be quiet, and for making an unprofessional comment that was heard by a customer.

The claimant reopened his claim for unemployment insurance benefits during the week of June 13, 2004. He filed claims for the weeks ending June 26 through July 31, 2004. He received his maximum weekly benefit amount of \$215.00 for each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct,

unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

As of January 29, 2004, the claimant knew or should have known his job was in jeopardy if he again failed to follow the employer's instructions. The claimant realized Busch was not happy with him after she talked to him on June 14 about comments he made about his co-workers. On June 15, management made a reasonable request for the claimant and a server to be quiet because they were arguing with one another at work. Instead of following this directive, the claimant made additional comments. The claimant's additional comments amount to an intentional and substantial disregard of the standard of behavior the employer has right to expect from an employee. The claimant again failed to follow management's instructions. The claimant's conduct on June 15 amounts to work-connected misconduct. Therefore, as of June 13, 2004, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code §96.3-7. The claimant is not legally entitled to receive unemployment insurance benefits during the weeks ending June 26 through July 31, 2004. The claimant has been overpaid \$1,290.00 in benefits.

DECISION:

The representative's July 6, 2004 decision (reference 02) is reversed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of June 13, 2004. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits during the weeks ending June 26 through July 31, 2004. He has been overpaid \$1,290.00 in benefits he received for these weeks.

dlw/b