

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VELVET BARNEY**  
Claimant

**APPEAL NO. 10A-UI-09878-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DUALE INDUSTRIES INC**  
Employer

**OC: 06/13/10**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated July 6, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 30, 2010. Claimant participated. Employer participated by Jennifer Erickson, office manager, and Prakash Nathan, manager. The record consists of the testimony of Jennifer Erickson; the testimony of Prakash Nathan; and the testimony of Velvet Barney.

**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 holds a franchise for and operates a Wendy's restaurant in Ames, Iowa. The claimant was hired on March 20, 2008, as a crew member. She was a full time shift manager on June 10, 2010, which was the date of her termination.

The incident that led to the claimant's termination occurred on June 10, 2010. The claimant had been ill but thought she was feeling well enough to come to work on June 10, 2010. While her boyfriend was driving her to work, she became nauseated and threw up. She did come to work but informed her manager, Prakash Nathan that she did not feel well and could not work. The restaurant was short handed and Mr. Nathan told the claimant that she needed to find a replacement.

What occurred after that is disputed by the parties. The claimant was terminated because Mr. Nathan believed that she used profanity in front of customers. The claimant denied she said anything in front of the customers and that she told Mr. Nathan that she had “worked her butt” off for the store. The claimant was terminated for the use of profanity, which was prohibited by the employer’s written policy against intimidating and abusive language.

**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 that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker’s duty to the employer. The use of profane and vulgar language in the workplace could be misconduct. The employer has the burden of proof to show misconduct.

Mr. Nathan testified that he terminated the claimant for using profane and vulgar language in front of customers. She was a shift manager and he felt this was a bad example for other employees. The claimant denied ever using profanity in front of customers. She claimed it was Mr. Nathan who used profanity with her when he got mad because she had come to work sick and did not have a replacement. She did admit to telling him that she had asked for respect and

that she had worked her butt off for the restaurant. There is no other testimony or evidence to support either version of events.

The administrative law judge believes that some type of heated exchange took place between the claimant and Mr. Nathan, but that who said what and to who cannot be determined with any certainty. Mr. Nathan probably was frustrated over the claimant's inability to work and the claimant probably took some offense at having to find a replacement. The administrative law judge cannot conclude, however, given the state of the record, that the claimant made profane and vulgar comments in front of customers. Since there is insufficient proof of misconduct, benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated July 6, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs