

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORA A HALL
Claimant

**G M R I
OLIVE GARDEN**
Employer

APPEAL NO: 10A-UI-05565-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/07/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department decision dated April 1, 2010 reference 02 that held the claimant was not discharged for misconduct on February 16, 2010, and benefits are allowed. A telephone hearing was held on May 27, 2010. The claimant, and her Attorney, Eric Bair, participated. Tom Armbrecht, Culinary Manager, Nate Keuper, Sales Manager, and Lucie Hengen, Representative, participated for the employer. Employer Exhibits 1 -5 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on September 29, 2008, and last worked for the employer as a part-time hostess/server on February 16, 2010.

An employer hostess reported to Manager Keuper on the evening of February 12th that claimant stated to another host in front of co-workers and guests, “seat the fuckers yourself”. Keuper confronted the claimant who admitted the profane statement. The employer sent the claimant home for her conduct. After referring the claimant’s conduct to the District Manager and Employee Relations, the claimant was discharged for violation of company policy that was using profane and abusive language in front of co-workers and guests.

Although the claimant admits her profane statement, she made it “under her breath” to where she believed only the host could hear her. The employer received no guest complaint. The claimant had no prior warnings for similar conduct.

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 administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on February 16, 2010.

Claimant admits making the profane statement to a hostess under her breath, but not to the point it could be overheard. The employer has offered no evidence the statement was overheard by any co-worker other than the hostess to whom she directed the remark, and there is no evidence any guest heard it either.

This is an isolated incident where the claimant used poor judgment, but, absent any prior warning for the same behavior, this behavior does not rise to the level of job disqualifying misconduct.

DECISION:

The department decision dated April 1, 2010, reference 02, is affirmed. The claimant was not discharged for misconduct on February 16, 2010. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs