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

LORI L ALLBEE
2518½ CENTRAL AVE
DUBUQUE IA 52001

DUBUQUE RACING ASSOCIATION LTD
PO BOX 3190
DUBUQUE IA 52001-3190

Appeal Number: 05A-UI-05411-RT
OC: 04/24/05 R: 04
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 is 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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Dubuque Racing Association Ltd., filed a timely appeal from an unemployment insurance decision dated May 10, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Lori L. Allbee. After due notice was issued, a telephone hearing was held on June 8, 2005, with the claimant participating. Dave Oglesbee and Christina Miller, might have been available to testify for the claimant, but were not called because their testimony would have been irrelevant and unnecessary. Tami Schnee, Human Resources Generalist; John Torres, Food and Beverage Director; and Lisa Dalsing, Food and Beverage Supervisor; participated in the hearing for the employer. Employer's Exhibits One through Four

were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Employer's Exhibits One through Four, the administrative law judge finds: The claimant was employed by the employer as a part-time food server from September 9, 2003, until she was discharged on April 23, 2005. The claimant averaged between 30 and 35 hours per week and sometimes, perhaps, more. The claimant was discharged for threatening another employee, and insubordination, and not working harmoniously with other employees, and as a result of the employer's progressive discipline policy. The employer prohibits, among other things, indecent conduct or language, threatening or intimidating another employee or a patron, insubordinate conduct, lack of courtesy to customers and co-workers, and an inability or unwillingness to work harmoniously with other employees. These rules are shown at Employer's Exhibit Three. The claimant received a copy of these rules and signed an acknowledgment therefore, also as shown at Employer's Exhibit Three.

On April 21, 2005, the claimant got mad at a co-worker. The claimant asked the co-worker, "Why are you being a bitch?" The claimant also threatened the co-worker in some fashion. The claimant also indicated that she was not going to do any more work because she had been doing all of the work that day. The claimant had been instructed to do certain work that she did not do. For this behavior, the claimant was discharged, as shown at Employer's Exhibit One.

The claimant received a final written warning on August 31, 2004, for using inappropriate language to employees when she referred to her supervisor as a "tall, skinny, stupid, ignorant mother fucker." The claimant did use that language about her supervisor. On April 21, 2004, the claimant received a written warning for threatening to "Jap slap" a co-worker. The claimant did threaten the co-worker in such fashion. The claimant received a verbal warning on July 30, 2004, for improper cell phone use and refusing to put down the cell phone after being told to do so. Pursuant to her claim for unemployment insurance benefits filed effective April 24, 2005, the claimant has received unemployment insurance benefits in the amount of $249.00 for benefit week ending April 30, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 23, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that on April 21, 2005, the claimant threatened a co-worker because she was angry, indicating in some fashion that she wanted to kill the co-worker. The claimant also refused to perform work that she had been instructed to do. The claimant denied making any such threats, and refusing to work, but the claimant's denial is not credible. The testimony of the employer's witnesses was hearsay, but it is supported by written statements by those present at the time and the administrative law judge concludes that those statements, and the witnesses' testimony, are credible, and the claimant's is not. Accordingly, the administrative law judge concludes that the claimant did make the threats and refused to do the work, as set out above, and that this behavior, coupled with the claimant's previous warnings and the employer's rules and regulations clearly prohibiting such behavior, a copy of which rules the claimant received and for which she signed an acknowledgement, were deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant even conceded that she asked a co-worker, "Why are you being a bitch?" The administrative law judge would conclude that this statement alone is disqualifying misconduct, in view of the claimant's prior warnings and the employer's rules. In Myers v. Employment

Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. Here, the claimant used profanity, and it was certainly confrontational and disrespectful and name-calling, and the target of the abusive name-calling was present, and the administrative law judge believes further that the use of such language is not an isolated incident.

The claimant received a final written warning on August 31, 2004, for, in the presence of co-workers, referring to her supervisor as that "tall, skinny, stupid, ignorant mother fucker." The claimant denied making this statement, but her denial is not credible. Again, the evidence is hearsay for this statement, but it is hearsay from different individuals than those who made statements about the incident on April 21, 2005, that gave rise to the claimant's discharge, which is discussed above. The claimant received a written warning on April 21, 2004, for threatening to "Jap slap" a co-worker. The claimant concedes that she did so. The claimant seeks to justify her actions by saying that the co-worker was upset and that she was a new employee and a friend and they routinely used this language. The administrative law judge does not believe that this language is appropriate under any circumstances. The claimant received a verbal warning on July 30, 2004, for improper cell phone use and failing to put away her cell phone after instructed to do so. The claimant denied this, but, again, the claimant's testimony is not credible.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant did make the statements and commit the acts as charged by the employer's witnesses, which were in violation of the employer's policies, and were disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $249.00 since separating from the employer herein on, or about, April 23, 2005, and filing for such benefits effective April 24, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 10, 2005, reference 01, is reversed. The claimant, Lori L. Allbee, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of $249.00.

kjw/pjs