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

WILLIAM D PETTIT
404 N WALNUT
CRESTON IA 50801

FARLEY'S & SATHERS CANDY CO INC
1 SATHER PLAZA
PO BOX 28
ROUND LAKE MN 56167-0028

Appeal Number: 06A-UI-04193-RT
OC: 03/26/06 R: 03
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant, William D. Pettit, filed a timely appeal from an unemployment insurance decision dated April 12, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 3, 2006, with the claimant participating. Glen Gates testified for the claimant. The employer, Farley's & Sathers Candy Company, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reach for the hearing, as instructed in the notice of appeal. 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, the administrative law judge finds: The claimant was employed by the employer, most recently as a kitchen operator, from April 13, 1998, until he was suspended on March 22, 2006 and then discharged on March 27, 2006. The claimant was suspended and then discharged for calling his supervisor, Bentley Nielson, a "cock sucker" because he was mad at him. The claimant was mad at Mr. Nielson because Mr. Nielson had "messed" with the computer and did not notify the claimant of this. During this exchange Mr. Nielson did not raise his voice but the claimant did so. The claimant had had other arguments before with Mr. Nielson and this was part of the reason for his discharge. The claimant had used profanity directed at others on prior occasions and had been suspended several months to one year ago and had also received a verbal warning prior to that time for his profanity. Other managers used profanity, including Mr. Nielson.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 & (9) provide:

> 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.

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The claimant credibly testified, and the administrative law judge concludes, that he was suspended on March 22, 2006 and then discharged on March 27, 2006. Whenever the reason for a claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged. Accordingly, the administrative law judge concludes that the claimant was effectively discharged on March 22, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although the employer did not participate in the hearing, the administrative law judge, nevertheless, concludes that there is a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The claimant was discharged for using profanity and arguing with his supervisor. On March 22, 2006, the claimant called his supervisor, Bentley Nielson, a "cock sucker." He did this because he was mad at Mr. Nielson because Mr. Nielson had "messed" with the computer and had not notified the claimant. The claimant conceded to this language and this was confirmed by the claimant's witnesses, Glen Gates. In fact Mr. Gates testified credibly that Mr. Nielson did not raise his voice but the claimant did so at least so as to be heard. The claimant also conceded that he had been in arguments before with Mr. Gates. The claimant also conceded that he had used profanity before, being suspended over one year ago. However, Mr. Gates said that the claimant was suspended several months ago. Nevertheless, what is clear is that the claimant was suspended for profanity, The claimant also conceded that he had received a verbal warning for profanity. The administrative law judge concludes that the claimant's repeated use of profanity after being warned and suspended and the severity of the profanity coupled with the claimant's anger and the fact that the profanity was directed at a supervisor who had not raised his voice, was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinced a willful or wanton disregard of the employer's interests and was, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. 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's use of profanity was clearly offensive, confrontational, disrespectful and name-calling and it does not appear to have been an isolated incident and the target of the abusive name-calling was present. Accordingly, the administrative law judge concludes that the claimant's use of such language was disqualifying misconduct.

The claimant seeks to defend his use of such profanity by testifying that other management used profanity but he did not "think" anyone did anything about it. There is no evidence that no action was taken nor is there any specific evidence as to exactly what the profanity was or the circumstances in which the profanity was used. Simply using profanity in the workplace without it being confrontational, disrespectful, or name—calling, may not be disqualifying misconduct, and, in any event, such language is no excuse for the claimant's use of the language as noted above. The administrative law judge specifically notes that the claimant had received a verbal warning and a suspension for the use of that language and he knew, or should have known, that it was inappropriate. Therefore, the administrative law judge concludes that the claimant

was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

DECISION:

The representative's decision of April 12, 2006, reference 01, is affirmed. The claimant, William D. Pettit, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct.

cs/tjc