

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENIKO D JEFFERSON**  
Claimant

**APPEAL NO. 12A-UI-12226-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NELLIS MANAGEMENT COMPANY**  
Employer

**OC: 09/16/12**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

Nellis Management Company filed a timely appeal from a representative's decision dated October 3, 2012, reference 01, which allowed unemployment benefits. After due notice was provided, a hearing was held on November 6, 2012. Claimant did not participate. The employer participated by Mr. Andy Logue, General Manager.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Deniko Jefferson was employed by the captioned employer, doing business as Long John Silvers/A&W, from January 31, 2011 until September 11, 2012 when he was discharged from employment. Mr. Jefferson worked as a part-time crew shift chief and was paid by the hour. His immediate supervisor was Andy Logue.

Mr. Jefferson was discharged following a complaint made by female workers that he was openly discussing sexual matters with another employee using inappropriate language. After receiving a number of complaints from female workers, the company investigated and took statements from numerous employees and determined that the claimant had violated company policy by explicit sex talk at work in the presence of other employees.

Company policy prohibits the use of inappropriate language and/or the creation of a hostile work environment for other employees. Mr. Jefferson was aware of the policy and had received a copy of the handbook. At the time of discharge the claimant had no explanation for his conduct.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The employer has the right to expect decency from its employees and an employee's use of offensive language or the use of offensive subject matter may be recognized as misconduct disqualifying the employee from the receipt of unemployment insurance benefits. See Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995).

In this case the claimant's use of inappropriate subject matter and inappropriate language caused embarrassment to other workers who were working that day and caused them to file complaints with the employer. Mr. Jefferson was aware that the use of inappropriate language and creating a hostile work environment for other workers could result in his termination from employment. The claimant had no explanation for his conduct and was discharged. There being no evidence to the contrary, the administrative law judge concludes that the employer has

sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

**DECISION:**

The representative's decision dated October 3, 2012, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, providing

that he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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