

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DONALD L SIMMS**  
Claimant

**APPEAL NO. 07A-UI-09315-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KRAFT PIZZA CO**  
Employer

**OC: 08/26/07 R: 04  
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer, Kraft Pizza, filed an appeal from a decision dated September 21, 2007, reference 01. The decision allowed benefits to the claimant, Donald Simms. After due notice was issued, a hearing was held by telephone conference call on October 17, 2007. The claimant participated on his own behalf and with a witness Bob Waters. The employer participated by Plant Staffing Specialist Jodie Martin.

**ISSUE:**

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

**FINDINGS OF FACT:**

Donald Simms was employed by Kraft Pizza from May 24, 2000 until August 30, 2007, as a full-time production worker. On June 26, 2003, he received a written warning and four-day suspension for violations of the workplace violence/harassment policy. He had verbally confronted a co-worker and threatened to “meet him outside” and inflict bodily injury. The warning was “indefinite” which meant it would stay on his record and would not automatically “drop off” after a certain time.

On August 1, 2007, a co-worker complained about comments the claimant had made, and he was suspended on August 2, 2007, pending investigation. He produced a written statement and then went on a pre-approved two week vacation. After he returned from vacation he and a union representative met with members of management to go over his statement and the results of the investigation. He had originally denied all the allegations but did finally admit to making at least one statement.

Mr. Simms was angry because the employer had been on funeral leave but the employer had counted those absences against him. He was “muttering under his breath” and was overheard by another employee saying, “I don’t fuck men in the ass and I don’t get fucked in the ass and that is what would happen to me if I go to prison. That’s why I won’t bring a gun in here and

blow people away.” This was made in front of a co-worker who is homosexual and he was offended by it. He also acknowledged making a comment that, “I’m not prejudiced, I hate everyone,” and apologized for it at the August 28, 2007, meeting. He admitted these were comments that should have been made “at the bar” and not in the workplace.

With these admissions the employer discharged him as this was the second violation of the workplace violence/harassment policy.

Donald Simms has received unemployment benefits since filing a claim with an effective date of August 26, 2007.

### **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 claimant had previously been warned about making inappropriate and threatening remarks in the workplace. He has acknowledged at least one comment made to another employee who took offense to the remark about being “fucked in the ass.” Whatever the claimant’s displeasure and disagreement with the employer may have been it does not give him license to make vulgar and obscene remarks to other employees in the workplace. This was not an isolated incident of poor judgment but a second violation of a known company rule and a violation of the duties and responsibilities the employer has the right to expect of an employee. The claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of September 21, 2007, reference 01, is reversed. Donald Simms is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$2,082.00.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/css