

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENIFER S DRAHOS
Claimant

G M R I INC
Employer

APPEAL NO: 09A-UI-18639-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/25/09
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 November 30, 2009, reference 01, that held the claimant was not discharged for misconduct on October 26, 2009, and benefits are allowed. A telephone hearing was held on January 26, 2010. The claimant participated. Joshua Keldgord, General Manager, participated for the employer.

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 worked as a part-time server for the employer from July 25, 2002 to October 26, 2009. The claimant was suspended from her job with pay on October 26, and discharged on November 2nd for violation of the employer's harassment/discrimination policy.

During her work shift on October 24, claimant observed an African-American server rapping to music in the kitchen, galley area. The claimant commented "why do all black people dance with their thing in their hands", as she was offended by this conduct. The server responded by questioning what was said, and the claimant repeated her comment and added the statement "just like all lesbians wear cowboy boots". Culinary Manager Overton was present, heard the claimant's comments, and reported the conduct to GM Keldgord the following day. When Keldgord received a claimant statement about her conduct on the next day, she was suspended and the matter was reported to Employee Relations for a disciplinary recommendation. When ER recommended discharge, GM Keldgord communicated it to the claimant on November 2nd.

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 suspended on October 26, and discharged for misconduct in connection with employment on November 2, 2009.

The claimant used poor judgment when she was offended by a co-worker rapping and holding his thing (meaning penis) by making a generalization comment about such conduct. The later reference to lesbian was directed to herself, and not intended to offend anyone. While the claimant demonstrated inappropriate conduct it does not rise to the level of job disqualifying misconduct.

DECISION:

The department decision dated November 30, 2009, reference 01, is affirmed. The claimant was not suspended/discharged for misconduct effective October 26, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs