

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORILEI L PROCTOR
Claimant

APPEAL NO. 11A-UI-13642-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE PRINTER INC
Employer

OC:09/18/11

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated October 7, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 9, 2011. Claimant participated. Employer participated by Janice Stice, human resources manager; Laresa Krugler, supervisor of fulfillment employees; and Dorothy Rhodes, fulfillment specialist. The record consists of the testimony of Janice Stice; the testimony of Laresa Krugler; the testimony of Dorothy Rhodes; and the testimony of Lorilei Proctor.

ISSUES:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a printing company. The claimant was hired on February 25, 2011, as an on-call temporary fulfillment employee. The claimant's last day of work was September 16, 2011. An incident that occurred on September 16, 2011, led the employer to conclude that the claimant would no longer be called for work.

On September 16, 2011, another employee named Ian was selling items for a fundraiser. Laresa Krugler, who is both the claimant's supervisor and her mother, knew that her daughter had no funds. She did not want to embarrass her daughter and so she asked Ian to go to another area of the building and not solicit her daughter's business. Ms. Krugler thought any items purchased for the fundraiser had to be paid for at the time of purchase. The claimant wanted to buy some items and thought she could pay for the items when she got her paycheck. This led to an argument in which the claimant said: "Are you fucking calling me a liar?"

It was time for the morning meeting and Ms. Krugler left. She decided that the claimant needed to be written up. After the meeting was over, she came to the claimant and asked her to come to a meeting with Lisa, who was the supervisor who would do the write up. The claimant got angry and threw some envelopes in the air. She said: "Fuck you." She also said: "Take this job and shove it up your ass." "You're an anal bitch." The claimant then got up and left the building.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is no present to hear them. See Myers v. EAB, 462 N.W.2d

734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The first issue in this case is the characterization of the separation of employment. Ms. Stice did not want to call the employer's decision a termination of employment but rather a decision not to call the claimant for any more work. The claimant was an on-call employee. The separation of employment, regardless of what terminology is used, is clearly a discharge because the employer made the decision to no longer utilize the claimant's services.

The greater weight of the evidence shows that the claimant was discharged for the use of profanity and engaging in disruptive conduct. The employer's witnesses, Ms. Krugler and Ms. Rhodes, both testified that the claimant threw envelopes in the air and used profane and vulgar language when Ms. Krugler asked the claimant to go with her to see a supervisor. The claimant admits that she did throw one envelope and used what she called "choice language." She insisted that she used the language after she punched out. She said that the reason she punched out is that Ms. Krugler told her that she needed to get another job.

The language used by the claimant was clearly inappropriate in the workplace and breached her duty of geniality and civility. Throwing one or more envelopes in the air in response to a request to attend a meeting is disruptive behavior. The employer has shown misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated October 7, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs