

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KORY J FERDEN
Claimant

APPEAL NO. 08A-UI-07402-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 06/08/08 R: 02
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Blazin Wings, Inc. filed an appeal from a representative's decision dated August 5, 2008, reference 02, which held that no disqualification would be imposed regarding Kory Ferden's separation from employment. After due notice was issued, a hearing was held by telephone on September 2, 2008. Mr. Ferden participated personally. The employer participated by Amber Hesley, Assistant Manager, and Joe Vogt, General Manager. The employer was represented by Steve Solovic of TALX Corporation.

ISSUE:

At issue in this matter is whether Mr. Ferden was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Ferden was employed by Blazin Wings, Inc. from December 10, 2007 until February 28, 2008. He worked from 30 to 35 hours each week as a food server. He was discharged for using profanity towards a coworker on the serving floor in the presence of customers.

On February 28, a coworker, Lark, made a statement that suggested Mr. Ferden was taking her tips. He called her a "fucking stupid bitch" and told her to get the "fuck" out of his face. His comments were overheard by the assistant manger, Amber Hesley. Ms. Hesley was standing the same distance from the two as some of the customers. She believed, based on the expressions of the customers, that customers overheard Mr. Ferden. As a result of this conduct, Mr. Ferden was discharged the same day.

Mr. Ferden filed a claim for job insurance benefits effective June 8, 2008. He has received a total of \$80.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Ferden was discharged for using profanity on the dining room floor in the presence of customers. He acknowledged during the hearing that he did make the comments the employer attributed to him.

Mr. Ferden knew or should have known that using profanity in the presence of customers was contrary to the employer's expectations. His conduct had the potential of causing customers to refrain from repeat visits to the establishment. He also knew or should have known that being verbally abusive to a coworker was contrary to the employer's standards. Mr. Ferden's conduct constituted a substantial disregard of the employer's interests and standards. If the conduct had occurred away from the dining room, the administrative law judge might be inclined to view it as a minor peccadillo. However, the name-calling and profanity occurred in the presence of customers. For the reasons cited herein, it is concluded that disqualifying misconduct has been established by the evidence and benefits are denied.

Mr. Ferden has received benefits since filing his claim effective June 8, 2008. As a general rule, an overpayment of job insurance benefits must be repaid. In the case at hand, an overpayment has resulted from the reversal of a decision allowing benefits based on a separation issue. Under such circumstances, the resulting overpayment may be waived if the claimant did not commit fraud or make untrue statements during the fact-finding interview that resulted in the favorable decision. Also, the employer must have failed to participate in the fact-finding interview. This matter shall be remanded to Claims to determine if Mr. Ferden will be required to repay benefits.

Mr. Ferden has had other employment since leaving Blazing Wings, Inc. He may have requalified for job insurance benefits prior to filing his current claim. It is his responsibility to provide proof of subsequent wages so that Workforce Development can determine if he requalified. If he had requalified, such a determination may effect whether he has been overpaid.

DECISION:

The representative's decision dated August 5, 2008, reference 02, is hereby reversed. Mr. Ferden was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. This matter is remanded to Claims to determine if Mr. Ferden will be required to repay job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw