

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER L WEISMANN
Claimant

APPEAL NO. 09A-UI-08402-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TOM ZAIMES
Employer

OC: 04/26/09
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

Princess Grill & Pizzeria filed a timely appeal from a representative's decision dated June 3, 2009, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 25, 2009. Claimant participated personally. The employer participated by Tom Zaimes, company owner.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having reviewed the evidence in the record, finds: The claimant was most recently employed as a part-time dishwasher for Princess Grill & Pizzeria for one and one-half years before being discharged on April 18, 2009.

On April 18, 2009, the claimant, Christopher Weismann, contacted the employer via telephone at approximately 4:15 p.m. Mr. Weismann was scheduled to work that night, however he indicated that he would not be reporting to work as his father had been involved in an automobile accident in Marshalltown, Iowa and the claimant needed to visit his father in the hospital. The claimant was reminded that company policy required the attempt to secure his own replacement. Mr. Weismann attempted to secure a replacement, but was unable to do so.

Subsequently, the company owner, Mr. Zaimes, was contacted by Terry Weismann, the claimant's father, via telephone. Based upon statements that the father made, the employer believed that the claimant had been untruthful in providing a reason for wanting to be off work that night.

The employer contacted the claimant via telephone to inform the claimant that he was expected to report for work. At that time, Mr. Weismann made the statement, "I just wanted the night off." The claimant then became angry and directed repeated, inappropriate, vile comments at Mr. Zaimes, using inappropriate language and threatening the employer with bodily harm. A decision was then made to terminate Mr. Weismann based upon his conduct that day.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes misconduct sufficient to warrant a denial of unemployment insurance benefits. It does.

The evidence in the record establishes that the claimant had requested to be off on the evening of April 18, 2009, based upon what the claimant described as an emergency situation in another city. Because of conflicting information received from the claimant's father, the employer had questions as to whether the claimant's absence was truly necessary for emergency reasons. When the employer contacted Christopher Weismann again by telephone that afternoon, Mr. Weismann stated that he, "Just wanted the night off." The claimant then repeatedly directed foul, inappropriate language to his employer and threatened bodily harm to the employer resulting in the claimant's discharge from employment.

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.

For the reasons stated herein, the administrative law judge concludes that the claimant's inappropriate use of vile and inappropriate language and the claimant's making of threats of bodily harm to the employer illustrated a willful disregard for the employer's interests and reasonable standards of behavior that the employer had a right to expect of its employees under the provisions of the Iowa Employment Security Act. Claimant is disqualified from receiving unemployment insurance benefits.

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 June 3, 2009, reference 01, is reversed. Christopher Weismann is disqualified and benefits are withheld until he has worked in and earned wages for insured work equal to ten times his weekly benefit amount provided that he is otherwise eligible.

The issue of whether the claimant must repay the unemployment insurance benefits is remanded to UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

srs/pjs