

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY M ARMSTRONG
Claimant

APPEAL NO: 12O-UI-01377-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVENTURE LANDS OF AMERICA INC
Employer

**OC: 07/31/11
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 September 8, 2011, reference 02, that held claimant was not discharged for misconduct on July 3, 2011, and which allowed benefits. An administrative law judge reversed the department decision on December 13, and claimant appealed. The Employment Appeal Board issued an order remanding this matter for a new hearing.

A telephone hearing was held on March 27, 2012. The claimant participated. Matt Krantz, general manager, participated for the employer.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid unemployment benefits.

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 began employment on February 25, 2011, and last worked for the employer as a full-time utility employee bussing tables on July 3, 2011. The employer/GM terminated claimant for her involvement in an incident at the restaurant on July 3. The incident was so disturbing that parent/guests left with children, and complained to the employer.

Claimant acknowledges that there had been an issue involving a lead person employee prior to the GM becoming involved. Claimant denies she used profanity and otherwise acted inappropriately in this matter. The employer/GM did not offer any corroborating witness and/or written statements that it was claimant who used profanity, though his testimony is he requested claimant to calm down and escorted her to another area to terminate her is credible.

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 discharged for misconduct in connection with employment on July 3, 2011.

The employer's testimony lacks corroborating evidence that it was claimant who used profanity and acted inappropriately in the restaurant incident to the point of disqualifying job misconduct. Claimant offered a credible explanation about what occurred up to the point of the GM involvement and then it becomes a she said, he said exchange as to whether claimant was the responsible party for use of profanity and inappropriate behavior. While reason and experience rest with the notion that it takes two to quarrel, the burden of proof is with the employer to establish that claimant's conduct establishes job misconduct.

DECISION:

The department decision dated September 8, 2011, reference 02, is affirmed. The claimant was not discharged for misconduct on July 3, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw