

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY A STRAWHACKER JR
Claimant

APPEAL NO. 10A-UI-08820-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA MACHINE SHED CO
Employer

**OC: 05/16/10
Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 10, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on September 14, 2010. Claimant participated. Employer participated by Karen Grunder, Assistant Chief Operating Executive. The record consists of the testimony of Karen Grunder; the testimony of Jeffrey Strawhacker; and Employer's Exhibits 1-4.

ISSUE:

Whether the claimant was discharged for misconduct.

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 restaurant located in Davenport, Iowa. The claimant was hired on May 28, 2007. At the time of his termination on May 16, 2010, the claimant worked third shift cleaning the restaurant.

The incident that led to the claimant's termination occurred on May 15, 2010. The claimant and another employee got into an altercation, which led to the claimant hitting the other employee. The claimant was asked by one of the bakers to leave the restaurant, which the claimant did. Karen Grunder was informed of the incident and she also read the following note, which was written by the claimant:

Jeff Karen,
Roger and I was playing around and he hit me so I hit him back just playing around. So ricky got in the middle of it and started to yell in my face and he pushed me and told me to get the fuck out. Or he was going to hit me so I left.

Sorry J.J.

(Exhibit 1)

Ms. Grunder did an investigation and was told by Roger that the claimant had been following him, asking him if he (Roger) wanted to see his (the claimant's) penis. Roger's statement was confirmed by other employees. The claimant denied he ever said anything to Roger other than asking Roger what was wrong.

The employer has a no tolerance policy for touching other employees and for fighting in the workplace. The claimant was aware of this policy.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. 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. An employer can reasonably expect that employees will not engage in horseplay and physical contact, particularly if that type of behavior is explicitly prohibited by the employer's rules. The employer has the burden of proof to show misconduct.

The claimant admitted that he "smacked" another employee on the neck while the two of them were working. The circumstances that led up to that physical touching are in dispute. The claimant said that this other employee hit him first. The evidence from the employer, which is hearsay in nature, is that the claimant had provoked the initial contact by making lewd comments to the employee. The claimant denies that he said anything about his genitalia.

What is not in dispute, however, is that the claimant physically touched another employee and in turn was asked to leave the restaurant. The claimant admits he touched the other employee. The employer has a no tolerance policy for such conduct. Whether the contact was horseplay or something else, the claimant deliberately violated a known policy. His action was deliberate. The employer has established misconduct. Benefits are denied.

DECISION:

The decision of the representative dated June 10, 2010, reference 01, is affirmed. 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.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs