

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JENNIFER M BRIGGS
1609 GRAND AVE
DAVENPORT IA 52803**

**FAMILY VIDEO MOVIE CLUB INC
DBA FAMILY VIDEO
1022 E ADAMS ST
SPRINGFIELD IL 62703-1028**

**Appeal Number: 04A-UI-06547-RT
OC: 05-09-04 R: 04
Claimant: Appellant (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Jennifer M. Briggs, filed a timely appeal from an unemployment insurance decision dated June 1, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on July 9, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Gina Cook, Human Resources Administrator, and Wendy Frieden, District Manager, participated in the hearing for the employer. Heather Shepherd, Store Manager, was available to testify for the employer. When the administrative law judge called her, he was disconnected and later determined that her testimony would have been repetitive and unnecessary so she was not called again. The administrative law judge takes

official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time customer service representative from December 19, 2002 until she was discharged on May 13, 2004. The claimant had also been previously employed by the employer. The claimant was discharged for using profanity and derogatory comments in the presence of customers on or about May 11, 2004. The claimant remarked to a customer "no shit Sherlock" and then made a reference to how she was smarter or had better education than the customers. At least two other customers overheard these comments. One of the customers laid down the movies that he was going to rent, left the store, called to complain and terminated his business with the employer. Another customer also overheard this statement and commented about the statement. In the last several months of the claimant's employment, she did not get any specific warnings about this behavior but, in the discussions of a promotion and a raise, the claimant was informed that she needed to work on her customer interactions. The claimant had also received previous warnings prior to that time for similar behavior. At fact-finding the claimant admitted that she had said "no shit Sherlock, I have a better education than most of the customers in here." The claimant also conceded that she knew it was wrong and that she said this to a customer.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The administrative law judge concludes that the claimant was discharged on May 13, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that, on or about May 11, 2004, the claimant remarked to a customer "no shit Sherlock" and then commented about how she was smarter or had better education than the customers. At least two other customers overheard this. One customer severed his business relationship with the employer and called to complain about the statement. Another customer commented about the statement to the employer. This statement occurred just a couple of months after the claimant had had a discussion about promotion and raises and informed that she needed to work on her customer interaction. The claimant had also received warnings or disciplines previously about this or similar behavior.

At fact-finding the claimant conceded to all of this and further conceded that she knew it was wrong. In the absence of any other evidence to the contrary, the administrative law judge concludes that claimant's behavior was a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals provided that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. The administrative law judge notes that the claimant's statement was offensive and disrespectful and made to a customer and in the presence of other customers.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

DECISION:

The representative's decision of June 1, 2004, reference 01, is affirmed. The claimant, Jennifer M. Briggs, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct.

tjc/tjc