

**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**

**SUSAN L CROW
854 DORMANN ST
JESUP IA 50648**

**CASEY'S MARKETING COMPANY
D/B/A CASEY'S GENERAL STORE
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

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**Appeal Number: 04A-UI-11099-RT
OC: 07/04/04 R: 03
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, Susan L. Crow, filed a timely appeal from an unemployment insurance decision dated October 11, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on November 19, 2004, with the claimant participating. The claimant was represented by Timothy Boller, Attorney at Law. The claimant's husband sat in on the hearing. The administrative law judge attempted to contact Linda Van Slyke and Kathy Sailor who were suppose to testify for the claimant. The administrative law judge was unable to reach either of those witnesses. Paula Floyd was available to testify for the claimant but not called because her testimony would have been irrelevant and unnecessary according to Mr. Boller. Marilyn Dunkelberger, Manager of the employer's store in Jesup, Iowa, and Patricia Bjorheim, Cashier, participated in the hearing for the employer, Casey's Marketing Company, doing business as Casey's General Store. 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 donut maker for approximately five years until she was discharged on September 24, 2004. The claimant averaged between 15 and 24 hours per week. The claimant was discharged for an incident occurring over the weekend of September 17 through 19 and in particular on September 18, 2004. On that day, although the claimant was not scheduled to work, she came to the employer's location because she was upset with the way her 401-K plan had been prepared and because she wanted more hours. She wanted to talk to the assistant manager, but the assistant manager was not there. The claimant was angry and upset and became loud and used profanity including the word "fuck." A customer was in the store at the time. A coworker, Linda Van Slyke, heard the claimant's profanity. The claimant also came in on another occasion that week and was also loud and upset about her 401-K plan. The employer has a policy in its handbook at rule 34.500 providing that employees should behave in such a manner as would be appropriate to the workplace.

The claimant had had a previous anger problem which was mentioned in her performance evaluation on August 8, 2003 and was the subject of a written warning on May 12, 2004 when the claimant was given a written warning for speaking rudely to the assistant manager and slamming around pans. The claimant had had other outbursts of temper and anger. The manager of the employer's store in Jesup, Iowa, where the claimant was employed, Marilyn Dunkelberger, one of the employer's witnesses, was not in town over the weekend of September 17-19, 2004. When she returned she waited until September 24, 2004 to discuss this matter with Ms. Crow. Ms. Crow was angry and upset and gave Ms. Dunkelberger no opportunity to discuss this matter with her and the claimant was discharged at that time.

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 parties testified that the claimant was discharged but disagreed on the date of the discharge. The claimant testified that she was discharged on September 21, 2004 but the employer's witness, Marilyn Dunkelberger, manager of the employer's store in Jesup, Iowa, where the claimant was employed, testified that the claimant was discharged on September 24, 2004. Although it makes little difference here, the administrative law judge concludes that the testimony of Ms. Dunkelberger is more credible and that the claimant was discharged on September 24, 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. Ms. Dunkelberger credibly testified that during the weekend of September 17 through the 19, 2004 and in particular on September 18, 2004, the claimant came to the employer's store even though she was not scheduled to work, about concerns regarding her 401-K plan and additional hours. When the assistant manager was not there, the claimant became upset over her 401-K plan and became loud and used profanity including the word "fuck." Ms. Dunkelberger's testimony was all from hearsay evidence from Linda Van Slyke, a coworker who was present and heard the claimant. The claimant concedes that she used the profane word, "fuck" but denies that it was loud. However, Ms. Dunkelberger testified otherwise and the claimant at fact-finding stated that she was loud. At fact-finding, the claimant also stated that she was discharged on September 24, 2004. Accordingly, the administrative law judge concludes that the claimant did use the profane word attributed to her and that she was loud, angry, and upset. The evidence also establishes that there was a customer in the store at the time that the claimant was there. The claimant also came into the store on one other occasion during that weekend and was loud and angry. When Ms. Dunkelberger returned from being out of town she discharged the claimant.

The administrative law judge concludes that the claimant had an anger problem. Ms. Dunkelberger credibly testified to that effect. The claimant's anger was mentioned in a performance evaluation on August 8, 2003 and was the subject of a written warning on May 12, 2004 when the claimant spoke rudely to an assistant manager and slammed pans. The

claimant seemed to deny the performance evaluation but then testified that she simply did not recall the performance evaluation. The claimant also at first attempted to deny the written warning and then testified that she did not see it, but finally agreed that she had been given a written warning but had refused to sign it. Because of the claimant's warning and a propensity to act angrily and finally because of the claimant's admissions as to the incident on September 18, 2004, the administrative law judge concludes that claimant's behavior were deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are 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 held 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 concludes that the claimant did use profanity and is skeptical as to whether the use was an isolated incident because of the claimant's propensity for anger and that the target of the abusive name-calling was present or at least the profanity was used in the presence of a coworker and a customer. The question of whether the use of improper language is misconduct is a fact question to be considered with other relevant factors including the context in which was said and the general work environment. Here, the employer has a clear policy that provides that employees must behave appropriately to the workplace and the administrative law judge further notes that the claimant's language was used at a store owned by the employer and in the presence of a customer. There was a question as to whether the customer heard the profanity or not but that is not the issue. The question here is whether it was improper for the claimant to use such profanity in a store in particular when there were customers in the store. The store is not an appropriate general work environment for an employee to use such language. Accordingly, the administrative law judge concludes that the claimant's language was disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's behavior including her anger and her profanity, was disqualifying misconduct. Therefore, 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 dated October 11, 2004, reference 01, is affirmed. The claimant, Susan L. Crow, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct.

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