

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER NORRIS
Claimant

APPEAL NO: 11A-UI-08176-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRUEGGER'S ENTERPRISES INC
Employer

**OC: 11/28/10
Claimant: Appellant (2)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Christopher Norris (claimant) appealed an unemployment insurance decision dated June 16, 2011, reference 09, which held that he was not eligible for unemployment insurance benefits because he was discharged from Bruegger's Enterprises, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 14, 2011. The employer provided a telephone number but was not available when that number was called for the hearing, and therefore, did not participate. The claimant participated with Attorney Glenn Norris. The claimant elected to participate with an affidavit and a brief where were admitted as Claimant's Exhibits A and B. Since the claimant's affidavit referred to three documents the employer provided, the record was reopened and Employer's Exhibits One through Three were also admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 reviewed and considered all of the evidence in the record, finds that: The claimant was employed as a full-time assistant manager from February 23, 2011 through May 20, 2011 when he was discharged. He started with the West Des Moines, Iowa store and when General Manager Vicki Milligan was going to be transferred, she requested the claimant move with her. Both employees moved to the Kaleidoscope location in Des Moines in early May 2011. The claimant and the general manager were having some conflict on May 17, 2011 and the claimant reported the conflict to Rick Bonge. Mr. Bonge advised the claimant he was going to be transferred to the Ingersoll store after May 20, 2011.

The claimant and Ms. Milligan argued with each other on May 19, 2011 and the claimant told his supervisor that she needed to be hospitalized. He further stated something like, she was crazy or psycho, and customer Stephanie Sanger heard these comments. Ms. Milligan left at that

point and the claimant subsequently said to Heather Small, "God, I hate that cunt." The claimant's written statement provided for this hearing stated, "The comment Heather ascribed to me talking to myself in anger, was not made to her, and I was not aware she was in listening range." Mr. Bonge made the decision to discharge the claimant after he received written statements from Ms. Milligan, Ms. Small and Ms. Sanger. The claimant was discharged on May 20, 2011.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not

necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing; three pages of its documentation were admitted into evidence solely because the claimant referred to these letters in his affidavit. The sum of the evidence does not rise to the level of job misconduct as that term is defined in the above stated Administrative Rule. The employer failed to meet its burden. Work-connected misconduct has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated June 16, 2011, reference 09, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs