

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANTRICE SMITH
Claimant

APPEAL NO. 10A-UI-13158-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

OLD CHICAGO BISTROS AND MORE INC
Employer

OC: 08-01-10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 21, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 4, 2010. The claimant participated in the hearing. Scott Gilroy, General Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time server for Old Chicago Bistros and More from December 15, 2009 through July 30, 2010. She was discharged after she allegedly said on July 28, 2010, that she does not “do black people,” meaning she does not wait on black people, but the claimant denied making that comment. The claimant did question why she always has to have the black tables but did not refuse to take the table. She is African-American and feels black people try to take advantage of her race to get free food. Once when a table of 14 African-Americans tried to get free food from her and she refused, the kids poured ranch dressing on her and the parents laughed. The claimant felt that the employer would skip other servers to place African-Americans in her section. She complained to human resources and things were better until the employer apparently believed nothing was going to happen because of her complaint. The claimant had received only one previous written warning on July 18, 2010, for not taking a table and being disrespectful to a manager. The claimant said in that instance that another server offered to take her table and she agreed to it. She did not know her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 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 claimant was discharged July 30, 2010, for allegedly saying she "doesn't do black people." She credibly denied making that statement and the employer could only offer hearsay evidence that the statement had been made. The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's firsthand denial of such conduct. The employer has not met its burden of proving disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The September 21, 2010, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw