

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT A SHAMBLEN
Claimant

APPEAL NO. 06A-UI-10206-H2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

PEPSI - COLA GENERAL BOTTLERS INC
Employer

**OC: 10-16-05 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 5, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 1, 2006. The claimant did participate. The employer did participate through Bob Johnson, Production Manager, (representative) Dave Bramow, Warehouse Manager, Greg Tiedemann, Plant Manager and Scott Klahsen, Human Resources Generalist.

ISSUES:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a machine operator full time beginning September 17, 1990 through August 29, 2006 when he was discharged. The claimant was discharged for using the word “nigger” when recounting a story about how he pulled a firearm when he was working as a bouncer at a local nightclub. The claimant told the story on August 25, 2006 to his coworkers including Larry Taylor, Eric Farmer, Kevin Ott and Dave Erickson. The claimant was repeating what someone said to him while working at the club. The other employees confirmed that the claimant used the n-word in recounting his conversation. At hearing the claimant admitted that he used the n-word when telling his story about what happened at the club where he worked as a bouncer.

On January 31, 2006, the claimant underwent training for harassment behavior. The training included explanations of discriminatory or derogatory remarks.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 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 when the vulgar statements are initially made." Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990).

The claimant alleges that because he was only repeating what he heard someone else say, he should not be held responsible for his use of offensive language. There was nothing stopping the claimant from editing his comments or deleting them altogether. The claimant cannot escape responsibility for using an offensive racial slur by indicating he was only repeating what someone else had said. The claimant knew or should have known that using the n-word is offensive, no matter in what manner it was used. While this may have been an isolated

incident, the conduct does rise to the level of disqualification by standard of severity. Misconduct has been established. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The October 5, 2006, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,593.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/cs/pjs