

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CINDY L JONES**  
Claimant

**APPEAL NO. 10A-UI-07671-VS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MACDONALDS**  
Employer

**OC: 05/21/10  
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated May 21, 2010, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 9, 2010. Claimant participated. Cindy Jones and Harold Clay participated as witnesses on the claimant's behalf. Employer participated by Kevin Murphy, owner. The record consists of the testimony of Kevin Murphy; the testimony of Cindy Jones; the testimony of Crystal Jones; Claimant's Exhibits A-B; and Employer's Exhibits 1-5.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a McDonald's restaurant located in Rock Island, Illinois. The claimant was hired as a crew person on June 2, 2009. The claimant was terminated on April 9, 2010. The employer believed that she had violated the written rules of conduct by using profanity in the restaurant, which was overheard by a customer.

The incident that led to the claimant's termination occurred on April 8, 2010. The claimant and another employee got into an argument about hiring the claimant's daughter. The claimant and the other employee, Chris, were told to go back to work. The owner, Kevin Murphy, received a complaint from a customer, who claimed he heard the claimant use profane language. The customer was offended by the language and would not repeat it. He said he was going to take his business elsewhere. The customer would not file a written complaint.

Mr. Murphy discussed the incident with Justina, the manager, and the claimant was sent home. Mr. Murphy spoke with some other individuals and decided to terminate the claimant. The claimant denied ever using profanity in the store.

**REASONING AND CONCLUSIONS OF LAW:**

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer can reasonably expect that profane and vulgar language will not be used in the workplace. An employee owes a duty of geniality and civility and the violation of that duty can constitute misconduct. The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to show misconduct. The claimant acknowledged that she and another employee got into an argument about whether the claimant's daughter should be hired. A good friend of the claimant, Harold Clay, was in the restaurant and he knew the two were arguing. He did not hear any profanity. Although Mr. Murphy received a customer complaint, the customer would not repeat the alleged profane language and Mr. Murphy does not know what the claimant said that so offended the customer. The employee who was arguing with the claimant did not testify at the hearing.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In *Schmitz v. Iowa Department of Human Services*, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of 91) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." *Id.* At 608.

No witness was present who corroborated the customer complaint, even though other employees were in the store at the time. The employer's evidence is largely hearsay. Even the direct evidence is vague. The administrative law judge cannot make a judgment about whether what was said was indeed vulgar and profane since no one could testify to anything other than that there was an argument and a customer complaint. This is insufficient evidence on which to base a finding of misconduct. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated May 21, 2010, reference 02, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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