

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICTORIA M BISCONTINE
Claimant

APPEAL NO. 08A-UI-07752-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

C E W RESTAURANT INC
KENTUCKY FRIED CHICKEN
Employer

OC: 07/27/08 R: 04
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

C.E.W. Restaurant, d/b/a Kentucky Fried Chicken, filed a timely appeal from the August 20, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was commenced on September 15, 2008 and concluded on September 18, 2008. Claimant Victoria Biscontine participated. Supervisor Nonie Robb represented the employer and presented additional testimony through Assistant Managers John Clark, Beth Robb, and Tracy Comstock. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which records indicate that no benefits have been disbursed to the claimant in connection with the claim established July 27, 2008.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Victoria Biscontine was employed by Kentucky Fried Chicken from February 2005 until July 31, 2008, when Supervisor Nonie Raab discharged her. Ms. Biscontine had been promoted to a full-time assistant manager position in April 2008. John Clark, Beth Robb, and Tracy Comstock were also assistant managers.

On July 25, 2008, Ms. Biscontine hosted an underage drinking party at her home. Ms. Biscontine was not of legal age to possess or consume alcohol. The other party participants were three Kentucky Fried Chicken non-management staff. The three non-management staff members were not of legal age to possess or consume alcohol. The party ended in the early hours of the morning when law enforcement arrived and forced Ms. Biscontine and the others to dump out the alcohol. Immediately after law enforcement departed, Ms. Biscontine telephoned Assistant Manager John Clark. Mr. Clark did not answer the phone, so Ms. Biscontine left a message. Ms. Biscontine asked whether Mr. Clark had summoned law enforcement to break up the party. In the message, Ms. Biscontine called

Mr. Clark a “fucker,” “asshole,” “shithead,” and “queer.” Ms. Biscontine also called Assistant Manager Tracy Comstock. Ms. Comstock did not answer the phone, so Ms. Biscontine left a message. In the message, Ms. Biscontine asked Ms. Comstock why she had summoned law enforcement to her apartment to break up the drinking party. Ms. Biscontine added, “I’ll get you back.” Mr. Clark and Ms. Comstock worked with Ms. Biscontine on a regular basis and recognized her voice and cell phone number. Ms. Biscontine left additional messages, sent text messages, and made hang-up calls to one or more of the assistant managers.

The employer’s established policies prohibited managers from fraternizing with non-management staff at work or outside of work. Ms. Biscontine was aware of the policy. Prior to the July 25, 2008 party, the employer had reprimanded Ms. Biscontine for violating the non-fraternization policy.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992).

The weight of the evidence in the record establishes misconduct in connection with the employment that disqualifies Ms. Biscontine for unemployment insurance benefits. The evidence indicates that Ms. Biscontine knowingly violated the employer's non-fraternization policy. The evidence indicates that Ms. Biscontine directed vulgar and otherwise offensive remarks at coworkers. The evidence indicates that Ms. Biscontine threatened and harassed coworkers and that this continued over the course of days.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Biscontine was discharged for misconduct. Accordingly, Ms. Biscontine is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Biscontine.

DECISION:

The Agency representative's August 20, 2008, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs