

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONNA C MILLER
Claimant

APPEAL NO. 09A-UI-19574-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARCON INC
Employer

OC: 11/29/09
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated December 22, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 9, 2010. Claimant participated. Employer participated by Amber O'Shoguy, general manager, and Kristyn Pennell, line leader. The record consists of the testimony of Amber O'Shoguy; the testimony of Kristyn Pennell; and the testimony of Donna Miller.

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 an Arby's restaurant located in Cedar Rapids, Iowa. The claimant was hired on September 11, 2008, as a front line crew person. She was a part time employee.

The incident that led to the claimant's termination occurred on November 22, 2009. The claimant complained to Amber O'Shoguy, the general manager, that some of the other employees were not working. Ms. O'Shoguy told the claimant that she (the claimant) was not doing anything either. She asked the claimant to go to the lobby and clean. The claimant got upset and called Ms. O'Shoguy a "fucking heifer." Ms. O'Shoguy told the claimant to go home.

The claimant called later to say that she was giving her two weeks notice. She did not speak to Ms. O'Shoguy, but to another manager. Ms. O'Shoguy told the manager to tell the claimant that she was "done."

The claimant had been previously suspended for one week following an incident on September 9, 2009. The claimant had had a verbal confrontation with a customer that had left the customer irate. The employer has a written policy in its employee handbook that prohibits

disrespect against managers and harassment in the form of name-calling. The claimant was aware of these policies.

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 disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the duty a worker owes to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990) An employer has the right to expect decency and civility from its workers. (See Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995). The employer has the burden of proof to show misconduct.

The greater weight of the evidence in this case is that the claimant called the general manager a "fucking heifer" or a "heifer" after the general manager asked her to go the lobby and find some work to do. The claimant had previously been suspended for arguing with a customer—a suspension that lasted an entire week. Although the claimant denied calling the manager a "fucking heifer", the conversation was overheard by the line leader and a customer. The line leader had to apologize to the customer for the claimant's conduct.

Whether the profane word was added to “heifer” or not, the claimant disrespected her manager and used words that were clearly not appropriate in the workplace. She had been previously warned and suspended for arguing with a customer. The employer has established misconduct. Benefits are denied.

DECISION:

The decision of the representative dated December 22, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant’s weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs