

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMIE A UTECH
Claimant

APPEAL NO. 09A-UI-03545-H

**ADMINISTRATIVE LAW JUDGE
DECISION**

**“HUGHES A BAGLEY INC
“MIKE’S SALOON**
Employer

**OC: 04/06/08
Claimant: Respondent (1)**

Section 96.5(2)a - Discharge

STATEMENT OF THE CASE:

Mike's Saloon filed an appeal from a decision dated February 24, 2009, reference 03. The decision allowed benefits to Amie Utech. After due notice was issued a hearing was held in Sioux City, Iowa on May 14, 2009. The claimant participated on her own behalf with witnesses Ignacio Asencio and Carol Lindstedt. The employer participated by Owner Marilyn Bagley, Supervisor Barb Kurtenbach, Earl Rowley and was represented by Angela Kayle. Exhibits One and A were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Amie Utech was employed by Mike's Saloon from April 16, 2008 until January 30, 2009 as a part-time server/bartender. On the night of January 30, 2009, Ms. Utech and Manager Heidi Trembly became involved in a verbal altercation. The incident appeared to have started when Ms. Trembly asked Ms. Utech to tend to the fire which was getting low in the fireplace. Ms. Utech said that she was very busy, that she'd already done a lot of Ms. Trembly's work for her and she had a lot of customers. Ms. Trembly then demanded the claimant's ticket book and referred to the claimant as a "welfare bitch." Ms. Utech responded by calling Ms. Trembly a pot smoking cannabis bitch." The altercation escalated from there until finally Owner Marilyn Bagley told the claimant to leave. Prior to that Ms. Trembly had taken the claimant's ticket book by force and then clocked her out and told her to "get out of here." At one point the claimant was pushed by Ms. Trembly and police were summoned but no charges were filed.

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 record does establish the claimant was involuntarily separated from this employment. Ms. Trembly telling the claimant to get out, taking her ticket book forcibly and clocking her out without allowing her to remain is evidence of a discharge. Both of the individuals appeared to have been at fault in this incident with the manager acting no less reprehensibly than the claimant. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. IDJS*, 351 N.W.2d 806 (Iowa App. 1984).

There does not appear to have been any disciplinary action against the manager for being involved in the same incident. The employer did not treat both parties to the incident equally. It has failed to meet its burden of proof to establish why the claimant was discharged for conduct no more or less egregious than the manager's, when Ms. Trembly was not fired. If one party was not fired then the other cannot be considered to have engaged in misconduct, either. Disqualification may not be imposed.

DECISION:

The representative's decision of February 24, 2009, reference 03, is affirmed. Amie Utech is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs