

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD A DAVIS
Claimant

APPEAL NO. 07A-UI-06713-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

JOHN BUFFINGTON
TNT VENDING
Employer

OC: 06-10-07 R: 01
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 27, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 25, 2007. The claimant did not participate. The employer did participate through Jon Buffington, Owner, Kathy Buffington, Manager of Cafeteria and Kristy Buffington, Vendor.

ISSUE:

Was the claimant discharged for work-related misconduct?

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 vendor/personal driver full time beginning February, 2006 through June 12, 2007 when he was discharged.

On June 12, 2007 the claimant was arguing with Kristy Buffington and used profanity when speaking to her. The conversation was overheard by Kathy Buffington, wife of the business' owner Jon Buffington. When Mrs. Buffington heard the claimant use profanity in front of customers and to another employee she told the claimant he could not speak like that and that he was discharged. Kristy Buffington said that Mrs. Buffington could not fire the claimant and the claimant laughed, turned in his keys and company equipment and left the premises. When Mr. Buffington learned that Mrs. Buffington had fired the claimant he attempted to call the claimant to tell him that he was not fired and to ask him to return to work. The claimant did not answer the phone and did not return to work. At the hearing Mr. Buffington testified that Mrs. Buffington did not have the authority to fire employees and that he would not have fired the claimant for using profanity in front of customers or when speaking to another coworker.

Mr. Buffington contends the claimant was a voluntary quit because he left after being told he was discharged by Mrs. Buffington and did not answer his phone or respond to Mr. Buffington's phone mail messages asking him to return to work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The employer, Mr. Buffington, indicated that he would not have discharged the claimant for using profanity in front of the customers or for speaking that way to another employee, thus, the claimant's use of profanity cannot be considered misconduct.

The claimant was told he was discharged by the wife of the owner of a small family business. It was reasonable for him to assume that she had the right to discharge him and for him to leave the premises. Once he left he was not required to return to work. Because the employer has not established misconduct and it was reasonable for the claimant to believe that Mrs. Buffington could discharge him, his discharge was not for work- related misconduct and benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The June 27, 2007, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs