

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHERLY M STEPHEN
Claimant

APPEAL NO. 09A-UI-06836-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**VILLAGE INN/BAKERS SQUARE
VICORP RESTAURANT**
Employer

**Original Claim: 04/05/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Heatherly Stephen (claimant) appealed a representative's April 28, 2009 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Village Inn (employer) for conduct not in the best interest of the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 29, 2009. The claimant participated personally. The employer was represented by Susan Chmelovsky, Hearings Representative, and participated by Joe Yearian, Assistant Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on December 21, 2007, as a full-time server. The claimant signed for receipt of the employer's handbook on December 21, 2007. The handbook has a progressive disciplinary policy. The employer did not issue the claimant any warnings during her employment.

On April 6, 2009, two female customers came into the restaurant. The claimant took the customer's drink order because their server was busy. She did not recognize the customers. The hostess told the claimant that one of the two customers called the claimant a "tweaked-out bitch". The claimant let another server handle the table's drink order. The claimant heard the customers tell approximately eight employees and customers in the restaurant that she was a "tweaked-out bitch". Some employees heard the customer call the claimant a "crack whore". The customers said they recognized the claimant from a bar. The claimant complained to the assistant manager, but he was on the telephone. He told the claimant to stay away from them and he would handle the situation.

After 15 minutes of name-calling, the claimant approached the table and calmly asked the customers not to call her names because she was not that person any more. The customers stood up, approached the claimant, and said "Bitch, I'll punch you in the face. You'd better get away from me now". They left the restaurant, called the employer, and complained.

The claimant was frightened by the incident but completed her shift and went home. The employer called her later on April 6, 2009, and terminated her for confronting the customers.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

It is true that the claimant failed to follow the employer's instructions when she approached the table. The claimant's actions do not rise to the level of misconduct, because her failure to follow instructions was not repetitious. The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's April 28, 2009 decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw