

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW L PEARSON
Claimant

APPEAL NO. 09A-UI-15211-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEAVER VENTURES INC
Employer

OC: 09/06/09
Claimant: Appellant (2)

Section 96.5-2-A - Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 30, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 8, 2009, in Davenport, Iowa. Claimant participated. The claimant was represented by John Graupmann, who is affiliated with HELP Legal Aide in Davenport, Iowa. Employer participated by Nonie Robb, Supervisor. The record consists of the testimony of Nonie Robb; the testimony of Andrew Pearson; and Employer's Exhibits 1-3.

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 in this case operates a Kentucky Fried Chicken/Long John Silvers restaurant in Clinton, Iowa. The claimant was hired on April 16, 2009, as a part-time crew member. He had also previously worked for the employer.

The incident that led to the claimant's termination occurred on September 3, 2009. It was a very busy time at the restaurant and the manager, Tracy Comstock, had asked the claimant to get some coleslaw from the refrigerator. When the claimant came back with the coleslaw, Ms. Comstock told the claimant to help with the packing. The claimant told Ms. Comstock to "shut up." Ms. Comstock sent the claimant home.

The incident was reported to Nonie Robb, the supervisor, and she did an investigation. She concluded that the claimant had refused to help with the packing and that he was loud and defensive with his supervisor and told her to "shut up." She terminated the claimant on September 5, 2009.

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 leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the duty a worker owed to the employer. The legal definition of misconduct excludes ordinary negligence in isolated instances or good faith errors in judgment or discretion. Profanity or other offensive language can be misconduct. The employer has the burden of proof to show misconduct.

The evidence in this case showed that during a busy and stressful time at the employer's restaurant, the claimant told his supervisor to "shut up." He raised his voice slightly but he did not use profanity or other offensive language. The claimant said "shut up" after his supervisor told him to help with the packing. He had just been sent to the cooler to get more coleslaw and had a tub of coleslaw in his hand when he was told to help with the packing. The claimant exercised poor judgment by using the phrase "shut up". That phrase, though ill advised, is not so offensive that misconduct has been established. The claimant's conduct constitutes poor judgment in what appears to be an isolated incident. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated September 30, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css