

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERTO R ARCH
Claimant

APPEAL NO. 11A-UI-00301-S2

**ADMINISTRATIVE LAW JUDGE
DECISION**

MCCALL COMPANY INC
CLEAN DES MOINES
Employer

OC: 01/17/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Clean Des Moines (employer) appealed a representative's December 30, 2010 decision (reference 04) that concluded Roberto Arch (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was for March 10 and April 8, 2011 in Des Moines, Iowa. The claimant participated personally through Interpreter, Anna Pottebaum. The employer participated by Greg McCall, President, and Gustavo Quito, Supervisor. The employer offered and Exhibits One and Two were received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 26, 2010, as a part-time worker. The employer has a handbook printed in English. The employer did not give the claimant a handbook. The supervisor read portions of the handbook to the claimant when he was hired. The claimant does not remember being read the handbook. The employer verbally warned the claimant In August, September, October, and November 2010, regarding inappropriate language and behavior at work. The employer told the claimant he was not allowed to speak at work.

On November 15, 2010, the claimant spilled a small amount of water from the bucket on the floor near the drain. The kitchen manager said "fuck you" to the claimant. The claimant told the kitchen manager "No more fuck you, please". He was trying, as best he could in English, to tell the kitchen manager not to use that language around him. The kitchen manager sent the claimant away. The claimant immediately went to the employer to relay what had happened. The employer suspended the claimant for a few days. The claimant went to the employer to collect his check on November 18, 2011. The employer terminated him.

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's December 30, 2010 decision (reference 04) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css