

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**ALFREDO ATILANO  
503 N 3<sup>RD</sup> AVE E #3  
NEWTON IA 50208**

**PRAIRIE MEADOWS RACE TRACK AND  
CASINO  
PO BOX 1000  
ALTOONA IA 50009-1000**

**Appeal Number: 06A-UI-01132-AT  
OC: 01-01-06 R: 02  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Alfredo Atilano filed a timely appeal from an unemployment insurance decision dated January 26, 2006, reference 01, which disqualified him for benefits. After due notice was issued, a telephone hearing was held February 15, 2006 with Mr. Atilano participating. Employee relations manager Gina Vitiritto-Robinson participated for the employer, Prairie Meadows Race Track and Casino.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Alfredo Atilano was hired as a seasonal employee by

Prairie Meadows Race Track and Casino on June 6, 2005. He became a full time employee on November 6, 2005 but was discharged on December 22, 2005. He worked as a line cook in the employee dining room. It was reported to human resources that on or about December 10, 2005 Mr. Atilano was deliberately rude to a co-worker, Rob Meiers, by deliberately failing to prepare his food as ordered. Mr. Meiers had initially asked for a cheeseburger and French fries. Later he asked that bacon be added to the order. Mr. Atilano initially asked Mr. Meiers to wait because he was taking an order from another customer. Inadvertently, Mr. Atilano neglected to put the French fries on the order until reminded by Mr. Meiers.

It was also reported that Mr. Atilano told another co-worker to "go get the damn register." That particular employee does not ever use the cash register. Mr. Atilano did not make the statement. It was also reported that Mr. Atilano had refused to take out some grease as instructed by the lead worker.

These matters were reported to human resources on or about December 12, 2005. No one advised Mr. Atilano that an investigation was in progress and that his job was in jeopardy. He was discharged on December 22, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that Mr. Atilano was discharged for disqualifying misconduct. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof. See Iowa Code section 96.6-2. Among the elements it must prove is that the final incident leading directly to the decision to discharge was a current act of misconduct. See 871 IAC 24.32 (8).

The incidents relied upon by the employer in reaching the decision to discharge Mr. Atilano all occurred on or about December 10, 2005. The discharge occurred 12 days later. Mr. Atilano was not put on notice that his job was in jeopardy. The administrative law judge concludes that the events, whether or not they constituted misconduct, were not current. No disqualification may be imposed.

The administrative law judge also notes that the employer relied exclusively on hearsay evidence in presenting its case. Ms. Vittirito-Robinson was not even the person who made the decision to discharge. No testimony was offered by the supervisors or the employees who had made the accusations against Mr. Atilano. Mr. Atilano explained the situation with the cheeseburger and denied the comment involving profanity. Even if the events had been current, the employer's evidence fell short of establishing willful misconduct.

**DECISION:**

The unemployment insurance decision dated January 26, 2006, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

kkf/kjw