IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

TINA M MURPHY Claimant **CITY HALL 1876 INC** Employer	**APPEAL 15A-UI-10748-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/30/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 23, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on October 8, 2015. The claimant participated personally. The employer participated through Emily Bradenburg, human resources manager.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a server and was separated from employment on August 25, 2015, when she was discharged.

The claimant was told she was discharged for poor performance. The employer asserted the claimant was discharged following an incident on August 22, 2015, while off duty, the claimant called her direct manager, Michelle Duvall, and indicated she wanted to bring some enchiladas to the memorial of a well-known customer whom she learned had passed away and was having his memorial service that day. The claimant showed up to the restaurant and spent nearly 30 minutes waiting for her enchiladas checking with both the cook, Juan Hernandez, whom she had a long standing history of not getting along with, and with her peers. The claimant paid for the enchiladas but became upset and eventually left without the food. The claimant denied causing a scene, besides crying, being disruptive or requesting her meal be compensated by the employer ("comped"). The decision was made to discharge the claimant based on her actions that day while off duty. After the decision was made, but before termination was delivered to the claimant, the claimant also made a disparaging post about Juan Hernandez, calling him an "asshole."

Prior to the final incident, the claimant had received three written warnings related to her attendance in June, July and August. The claimant had no prior warnings for conduct related to

professionalism or language, or similar conduct for which she was discharged, and was unaware her job was in jeopardy. The employer has a policy within its handbook, which the claimant received at the time of hire, requiring professionalism at all times by its employees on the premises.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was in fact discharged for work-connected misconduct as defined by the unemployment insurance law.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1).

In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The claimant denied demanding to be compensated for her enchiladas or causing a scene at the restaurant but admitted to crying. The employer did not present any first-hand witness or written statement to credibly refute the claimant's first-hand testimony. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. While not ideal, crying itself is not misconduct. The employer has failed to prove the claimant was discharged for a final act of misconduct, and therefore, the claimant is allowed benefits. Because the Facebook post was discovered after the decision to discharge had been made, it cannot be considered for purposes of misconduct and unemployment benefit purposes.

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The September 23, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/pjs