IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TINA M KLATT Claimant **SYDSO INC** Employer	**APPEAL NO. 12A-UI-12435-S2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/23/12** **Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Tina Klatt (claimant) appealed a representative's October 12, 2012 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Sydso (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 November 9, 2012. The claimant participated personally and through Ryan Irwin, co-worker. The employer participated by Allan Sorenson, president; Amy Richardson, assistant manager; and Eric Van Gorp, general manager.

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 having considered all of the evidence in the record, finds that: The claimant was hired on March 9, 2009, as a part-time sales associate. The claimant signed for receipt of the employer's handbook. The employer did not issue the claimant any warnings during the claimant's employment.

On September 13, 2012, the claimant started a cleaning project before the assistant manager was off the telephone. The claimant asked another person to help move the heavy fryer. The assistant manager got angry with the claimant for not waiting for her. The claimant told the assistant manager that if she was not on the telephone for fifty million years, she would have waited. The assistant manager told the claimant, "I was on the phone with a fucking customer taking a cake order." The claimant asked the assistant manager not to use profanity. Later, another assistant manager told the claimant that she was tired of smart asses. On September 14, 2012, the claimant tried to talk to the first assistant manager about the situation, but the situation was not resolved. The claimant felt unhappy at work because after trying to complete a cleaning job, one assistant manager used profanity at her and she thought another assistant manager called her a smart ass.

After her shift ended on September 14, 2012, the claimant sat in a booth in the lobby and worked on completing some job applications. On September 23, 2012, the employer terminated the claimant for completing job applications after her shift ended on September 14, 2012. The employer did not reprimand the assistant managers for using obscenities.

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.
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> 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.

871 IAC 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 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). An employer may discharge an employee for any number of reasons or no reason at all; but, if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential

liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Off premises during lunch hour, claimant assaulted co-worker for alleged rumors spread by co-worker. Court of Appeals allowed benefits, noting lack of evidence of negative impact at work place plus fact that claimant finished the day before being discharged. Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). The employer must establish not only misconduct, but that there was a final incident of misconduct which precipitated the discharge. The employer provided one incident of off duty conduct. The assistant managers used the words "fucking customer" and "smart asses" on duty and were not reprimanded. It is understandable that an employer would not like employees completing job applications at work. In this case, the claimant was in the customer area and off duty. The employer was not able to provide any evidence of a final incident of on duty, work-related misconduct The employer has failed to provide any evidence of willful and deliberate work-related misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no work-related misconduct.

DECISION:

The representative's October 12, 2012 decision (reference 01) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw