

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARGARETT L TIGER
Claimant

CRACKER BARREL OLD COUNTRY STORE
Employer

APPEAL 17A-UI-09252-DB

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/06/17
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the August 30, 2017 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. An in-person hearing was held on September 26, 2017 in Des Moines, Iowa. The claimant, Margarett L. Tiger, participated personally. Allen Tiger participated as a witness on behalf of claimant. The employer, Cracker Barrel Old Country Store, participated through witness Jean Montgomery. Employer's Exhibits 1 – 3 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a retail cashier, shift leader and trainer. This employer operates a restaurant and retail store. Claimant was employed from September 20, 2009 until August 7, 2017 when she was discharged from employment. Claimant's job duties involved assisting customers, stocking products, supervising staff, and training staff. DeeAnn Lily was claimant's immediate supervisor.

This employer has a written code of conduct policy for employees. See Exhibit 1. The written policy provides that an employee must be courteous, friendly, and helpful to guests and other employee at all times. See Exhibit 1. The written policy provides that employees shall not make threats to other employee or guests and that the employer has zero tolerance for threats or acts of violence. See Exhibit 1. Claimant received a copy of the written policies upon hire and the policies have not changed since she received a copy of them.

The final incident leading to discharge occurred on August 5, 2017. Claimant was arguing with another co-worker named Vicky Stinger. Claimant was supervising Ms. Stinger on this date.

The two were arguing about the way that Ms. Stinger rang up a product on the cash register. Claimant told Ms. Stinger that it was the incorrect way and insisted that the two go to the office to discuss the matter. Ms. Stinger walked away from claimant and entered the kitchen. See Exhibit 3. Claimant then grabbed Ms. Stinger's arm. See Exhibit 3. Claimant then uses her arms to physically turn Ms. Stinger around and forcibly guides her through the kitchen. See Exhibit 3.

The two spoke with Ms. Montgomery about the situation in the office. The two employees were then allowed to return to work. After the discussion with the parties, Ms. Montgomery learned from another co-worker who witnessed the incident that claimant pushed Ms. Stinger. Ms. Montgomery notified claimant by telephone that she was suspended pending an investigation on August 5, 2017.

Ms. Montgomery reviewed videotape of the incident and spoke to four separate witnesses to the incident. Three of the four witnesses confirmed that claimant pushed Ms. Springer. Claimant's husband testified that claimant told him that she may have pushed Ms. Springer.

Claimant was contacted by her supervisor, Ms. Lily, and told that she was discharged for violation of the written policy. Claimant had received one previous verbal warning in May of 2017 for use of profane language.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Exhibit 3 shows that the claimant grabbed Ms. Stinger's arm, then uses her arms to physically turn Ms. Stinger around and forcibly guides her through the kitchen. Further, claimant admitted

to her husband, Mr. Tiger, that she may have pushed Ms. Stinger. Claimant's actions are in violation of the employer's clear written policy against acts of violence.

Further, this was not a case where the claimant was forced to use self-defense. The claimant participated in the altercation and did not attempt to retreat or seek supervisor assistance. Claimant was the aggressor during the incident.

The employer has a right to expect civility among its employees. An employer does not have to tolerate violence in the workplace because it diminishes the overall expectation of safety, well-being and respect among employees in the work environment. Employers do have an interest in protecting the safety of all of its employees and invitees.

Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995). In this matter, the claimant was the party that instigated the encounter; claimant did not have a necessity to fight back and could have retreated instead of engaging in the physical altercation. Claimant chose not to and continued to engage in her aggressive physical touching of Mr. Stringer.

The employer has presented substantial and credible evidence that claimant used physical aggression against a co-worker in violation of a known written policy and acceptable standards of work behavior. This behavior was contrary to the best interests of employer and the safety of its employees and is disqualifying misconduct, even without prior warning. Benefits are denied.

DECISION:

The August 30, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Claimant is denied benefits until such time as she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs