

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SABRINA M FORMARO
Claimant

APPEAL 18A-UI-01063-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TASTY TACOS INC
Employer

**OC: 12/24/17
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 18, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 21, 2018. Claimant participated. Claimant's named witness Jamie Davis was not available at the telephone number provided and did not participate. Employer participated through company president Linda Mosqueda-Blair.

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: Claimant was employed as a full-time cook through December 15, 2017. Her last day of work was December 14, 2017, when a customer was unhappy with an incomplete order. Claimant made the replacement order food, slid it across the counter to the customer and asked her to check the order before leaving next time. The customer became upset and manager Jamie Davis¹ resolved the situation with the customer, who posted criticism on social media, including a photo of claimant.² Four other employees were working at the time, none of whom were called as witnesses.³ Employer's policy prohibits employees from being "rude" or "obnoxious." Claimant was aware of the policy. Surveillance video was available but was not reviewed. Claimant was not interviewed or questioned before the decision was made to discharge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

¹ Davis did not participate for claimant or employer.

² Employer did not provide the photo to claimant or at hearing.

³ Employer did not provide witness statements to claimant or at hearing.

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 decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No written statements of the individuals were provided to claimant or for the hearing. 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.

Iowa Code section 96.5(2)a provides:

Causes for disqualification.

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of

an employee is not necessarily serious enough to warrant a denial of benefits.” *Id.* (citation omitted). ...the definition of misconduct requires more than a “disregard” it requires a “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.” Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Whether an employee violated an employer’s policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp’t Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) (“Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits.” (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

While the claimant should not have placed the responsibility of order accuracy on the customer, the employer has failed to failed to rebut claimant’s credible denial of the allegations and has not met its burden of proof that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning that rises to the level of disqualifying conduct. Benefits are allowed.

DECISION:

The January 18, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs