IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GAYLA L IRVING
Claimant

OKOBOJI GRILL OF PLEASANT HILL INC
Employer

APPEAL NO. 12A-UI-13122-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 23, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 4, 2012. Claimant Gayla Irving participated. Kyle Botkin represented the employer and presented additional testimony through Darci Sanders. Exhibits One through Three and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Gayla Irving started with the Okoboji Grill of Pleasant Hill in 2010 as a hostess, but was subsequently promoted to the position of floor manager/assistant manager. During the last months of the employment, Kyle Botkin, General Manager, was Ms. Irving's immediate supervisor. Mr. Botkin discharged Ms. Irving from the employment when she arrived for work on October 5, 2012.

The final incident that triggered the discharge occurred on October 2, when Ms. Irving mishandled a situation when a regular patron wanted to watch Dancing With the Stars (DWTS) on one of the bar's televisions. Iowa native and Olympian Shawn Johnson was on DWTS that night. The employer had a policy of showing only sports shows on its several television stations. When Ms. Irving saw that the channel had been changed to DWTS, she asked bartender Darci Sanders why. Ms. Sanders told her that Jon, a regular patron who was seated at the bar three feet away from Ms. Irving, had asked to watch the program. The audio was turned off on the television that displayed DWTS. Ms. Irving announced in a less than tactful manner that Leroy, the owner, would not be happy if he came in and saw the television on something other than sports. Several other televisions in the bar were tuned to Monday Night Football with the audio for that program turned on. Ms. Sanders understood Ms. Irving's comment to mean that she needed to change the channel back to sports and did so. Ms. Irving knew that the customer was upset by the incident. Ms. Irving went outside to telephone

Mr. Botkin, but was unable to reach Mr. Botkin. Ms. Irving then telephoned the General Manager at the employer's other store, who told Ms. Irving that it was okay to play DWTS in light of Shawn Johnson being on the program and that the other restaurant was already playing the program on its televisions. Ms. Irving had not previously known that Shawn Johnson was on the program that night. When Ms. Irving returned inside to indicate it was okay to play DWTS, the customer in question had already paid his tab, left his drink unfinished, and departed, after vowing he would not be back. The customer returned the next evening, at which time Ms. Irving attempted to apologize. The customer was not interested in the apology and did thereafter temporarily cease his regular trips to the restaurant/bar.

In making the decision to discharge Ms. Irving from the employment, Mr. Botkin considered another incident from September 2, 2012. On that day, Ms. Irving instructed a host not to assist a particular server with bussing her tables because the server was not appropriately pre-bussing her tables. The server had a medical restriction that limited how much she could carry from a table with each trip. Mr. Botkin knew about the lifting restriction, but had not formally passed that information along to Ms. Irving. Despite that, it was common knowledge in the restaurant that the server had a lifting restriction. The server later complained to Mr. Botkin under the belief that Ms. Irving had singled the server out for harsh treatment.

In making the decision to discharge Ms. Irving from the employment, Mr. Botkin also considered an incident from January 2012, prior to Mr. Botkin's time in the restaurant. In January, the previous General Manager had issued a reprimand to Ms. Irving after Ms. Irving failed to properly manage a shift and ended up giving away free food to compensate customers who had to wait longer than the usual period to receive their food. Ms. Irving acknowledged in her response to the reprimand that there were areas of the restaurants operations, including expediting food orders, where she was weak and needed more training and experience.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

After carefully listening to the testimony and carefully weighing the testimony and exhibits, the administrative law judge concludes that Ms. Irving's mishandling of the matters referenced above was based on her not having the necessary skill set to perform the duties of a restaurant manager. This is evident in Ms. Irving's tactless approach to the DWTS matter. That incident and the incident concerning the server both reflect a failure on the part of Ms. Irving to fully consider a matter before responding in a manner that others perceive as discourteous, demeaning, or harassing. The incident from January 2012 highlights Ms. Irving's lack of experience. The evidence does not indicate that Ms. Irving acted with willful or wanton disregard of the employer's interests in connection with any of the three matters referenced above. The evidence indicates instead that her actions were misguided efforts to further the employer's interests as she perceived them. Ms. Irving's failure to perform to the satisfaction of the employer did not rise to the level of misconduct. Ms. Irving was discharged for no disqualifying reason. Accordingly, Ms. Irving is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's October 23, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/bjc