

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DIANE M RASSO
Claimant

BLAZIN WINGS INC
Employer

APPEAL 16A-UI-11306-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/25/16
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 October 13, 2016 (reference 01) unemployment insurance decision that denied benefits based upon her discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 2, 2016. Claimant, Diane M. Rasso, participated personally and through witness Rachel Anklam. Employer, Blazin Wings Inc., participated through hearing representative Thomas Kuiper and witness Scott Stegner.

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 part-time as a server from November 22, 2005 until September 15, 2016. This employer operates a restaurant. Claimant's job duties were to take orders from customers, serve food and drinks to customers, make change and assist with other customer requests. Claimant's last day physically worked on the job was September 14, 2016. On September 14, 2016 claimant's supervisor was Amanda Grapp.

On September 14, 2016 claimant was assisting her customer by making change at the cashier's station. While she was at the station another customer, who was not her direct customer, approached her to see if she could pay at the counter, as she was in a rush. Claimant told the customer "no, you pay your server". At that point, Ms. Anklam approached the customer and asked if she could assist. Ms. Anklam found the customer's server and told her that her customer was ready to pay.

A few minutes later the supervisor, Ms. Grapp, walked by the customer and asked if her visit was good. This customer told Ms. Grapp that claimant was rude and pointed to her. Claimant approached the two parties and stated to Ms. Grapp that she was not rude. The customer then said to claimant "yes you were very rude, you didn't even look up, you just said snippy that you have to pay your server" and then stated to claimant "I am not talking to you". Claimant

continued to engage in the confrontation with the customer about whether or not she was rude. Ms. Grapp moved the customer from one area to another in order to separate the customer and claimant; however, the claimant continued to follow the two parties. Claimant then left the area when she pushed open a door and stated "we can go outside" as she left. The customer then yelled an obscenity at claimant as she was leaving the restaurant.

Ms. Grapp approached claimant in the kitchen area to confront her on why she continued to argue with the customer and didn't walk away from the situation. Claimant continued to discuss the fact with Ms. Grapp that she was not rude to the customer to begin with. Claimant then said to another co-worker "I am going to put her in her place and she has it coming to her". Claimant was sent home for the remainder of her shift.

The following day when claimant arrived for her shift she was told that she was discharged due to the incident that occurred the day prior. Claimant did have previous discipline during the course of her employment which included a written warning on January 21, 2016 that stated claimant had inappropriate conduct when she was agitated and uncooperative in an investigation. Claimant's conduct included telling another co-worker to meet down the street or she was going to cut her. Claimant denied making these comments and refused to sign the written warning.

The employer has a written policy regarding interactions with customers. These policies were contained in the employee handbook which the claimant received a copy of. The policy addresses certain situations where the employee should escalate a customer issue immediately to manager and that if the employee is handling the complaint themselves they should resolve the complaint in a courteous manner.

REASONING AND CONCLUSIONS OF LAW:

As a preliminary matter, I find that the Claimant did not quit. Therefore this must be analyzed as a discharge case.

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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds employer's testimony more credible than the claimant's.

Employers generally have an interest in protecting the safety of all of its employees and invitees. The employer has presented substantial and credible evidence that claimant threatened a customer when she stated "we can go outside" and "I am going to put her in her place and she has it coming to her". This is also in violation of the employer's known policy.

Further, the Iowa Court of Appeals has determined that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). Claimant's use of offensive language in a confrontational context is contrary to the best interests of the employer and the safety of its customers and is disqualifying misconduct event *without prior warning*.

The employer has met its burden of proof in establishing the claimant committed job-related misconduct. As such, benefits are denied.

DECISION:

The October 13, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/