

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARCUS L SEALS**  
Claimant

**APPEAL NO. 07A-UI-04141-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GMRI INC**  
Employer

**OC: 03/18/07 R: 03  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

GMRI Inc., doing business as The Olive Garden, filed a timely appeal from the April 19, 2007, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on May 11, 2007. Claimant Marcus Seals participated. Kurt Isenberger, General Manager, represented the employer and presented additional testimony from Amy Foth, Sales Manager. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant.

**ISSUES:**

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes the claimant was discharged.

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: Marcus Seals was employed by The Olive Garden as a part-time utility worker/dishwasher from November 28, 2005 until January 8, 2007. The event that prompted the separation occurred on January 6, 2007, during a busy Saturday night dinner rush. At about 8:00 p.m. on January 6, Mr. Seals and a food server got into a verbal disagreement over whether Mr. Seals was going to hand the food server a rack of clean glasses. Mr. Seals and the server had a history of personality conflict. The server asked Mr. Seals to hand her a rack of clean glasses. Mr. Seals responded, "No." Sales Manager Amy Foth overhead the discussion, intervened, and told Mr. Seals to hand the glasses to the server. Mr. Seals refused. Mr. Seals then said, "I don't need this," and left his work area. Mr. Seals left the work area for several minutes. While he was away from the work area, Mr. Seals went outside to smoke and then spent several minutes in the "alley" area of the kitchen, where Ms. Foth observed him talking on his cell phone. In the meantime, Ms. Foth had contacted General Manager Kurt Isenberger and informed Mr. Isenberger that Mr. Seals had been in a verbal confrontation with another employee, had become upset, and had walked out. Mr. Seals had not in fact walked out, but had taken a break

to cool off. Mr. Isenberger told Ms. Foth to document the incident and that he would take steps to address the situation. The employer did not provide any documentation of the incident for the hearing. When Mr. Seals returned to his work area, Ms. Foth told Mr. Seals that Mr. Isenberger had determined that Mr. Seals should be sent home. The employer then observed as Mr. Seals left the restaurant.

On January 7, Mr. Isenberger contacted Mr. Seals and directed him to come in and provide a statement regarding what occurred on January 6. Mr. Seals came in and provided a written statement. The employer did not produce the written statement for the hearing. At the time Mr. Isenberger met with Mr. Seals, he informed Mr. Seals that he was suspended pending Mr. Isenberger's discussion with the Director of Operations and the Employee Relations Department. On January 8, Mr. Isenberger notified Mr. Seals that the employer deemed the employment relationship severed.

### **REASONING AND CONCLUSIONS OF LAW:**

The first question is whether Mr. Seals quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The greater weight of the evidence indicates that Mr. Seals did not form an intention to sever the employment relationship and did not indicate by his actions on January 6 an intention to sever the employment relationship. The administrative law judge notes that the employer has failed to provide the written statement Mr. Seals provided to the employer close in time to the alleged quit. The administrative law judge also notes that the employer has provided no documentation of the incident prepared by Ms. Foth close in time to the incident. Mr. Seals provided detailed and, by and large, credible testimony regarding his conduct on the evening in question. Mr. Seals' conduct on January 7 further evidences a desire to continue in the employment. The administrative law judge concludes that Mr. Seals was discharged and did not quit.

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).

The evidence in the record establishes the incident in question occurred during a busy Saturday night dinner rush. The evidence indicates that Mr. Seals was at that time juggling multiple responsibilities and made the determination that his other work took priority over handing the rack of glasses to the food server. Though Mr. Seals inappropriately refused Ms. Foth's directive to hand the glasses to the server, the evidence does not indicate a pattern of refusing to follow the employer's directives.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Seals was discharged for no disqualifying reason. Accordingly,

Mr. Seals is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Seals.

**DECISION:**

The Agency representative's April 19, 2007, reference 03, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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/kjw