

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA A ATKINSON
Claimant

APPEAL NO. 13A-UI-10953-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EL PRESIDENTE
Employer

OC: 08/25/13
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Melissa Atkinson, filed an appeal from a decision dated September 23, 2013, reference 01. The decision disqualified her from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on October 18, 2013. The claimant participated on her own behalf and was represented by Legal Aid Society of Story Country in the person of Erin Schneider. The employer, El Presidente, participated by Vice President Andrew Oswald. Exhibits A, B and C were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Melissa Atkinson was employed by El Presidente from November 2, 2010 until August 26, 2013 as a full-time instructor. In 2011 she received two written warnings for “inappropriate” comments about a student and “unprofessional” conversation during class.

After that she did not receive any further warnings until June 13, 2013, when she was disciplined due to student and client complaints about a racial comment, describing a make-up style as “chola.” On July 18, 2013, another warning for speaking to a student about other students and speaking disrespectfully to another staff member. The employer was unable to provide any details about what was said specifically or who actually complained.

On August 22, 2013, she was issued a written warning and two-day suspension. Five students reported to Vice President Andrew Oswald they had asked Ms. Atkinson why another staff member was absent. They alleged the claimant replied the other person was “drunk or on drugs.”

The claimant denied making the comment in the class and asserted the students complaining were part of a “gang” who resented her enforcing school rules and fabricated the complaint to get her in trouble. Other current and former students felt Ms. Atkinson was a good instructor.

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.

871 IAC 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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The claimant has denied the final incident of making the statement about the other staff members being "drunk or on drugs." The employer did not have any first-hand, eyewitness testimony to rebut that denial. The claimant did produce statements from other students and staff which confirmed her assertion that a small group of students were resentful of Ms. Atkinson and could have fabricated the allegation out of malice.

The administrative law judge cannot conclude the employer has presented sufficient evidence to establish the current, final act of alleged misconduct. It has failed to meet its burden of proof and disqualification may not be imposed.

DECISION:

The representative's decision of September 23, 2013, reference 01, is reversed. Melissa Atkinson is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs