IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ASHLEY A WANDER
Claimant

BROWN HOSPITALITY CORP
Employer

APPEAL NO: 12A-UI-12784-ST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/30/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department decision dated October 17, 2012, reference 01, that held she was discharged for misconduct on October 2, 2012, and benefits are denied. A telephone hearing was held on November 27, 2012. The claimant, witness, Jolene Bryant, and Attorney, Kara Morel, participated. Doug Brown, Owner/GM, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment as a full-time waitress on June 15, 2000, and last worked for the employer on August 31, 2012. She was on maternity leave as approved by the employer until October 2. The employer does not have written policies. It does not have a policy regarding employee social networking.

Claimant has a Face Book page and it states she works for employer. On November 30, 2011 claimant posted a comment about what makes her happy and stating "the small things like people who wanna punch me in the face for not clearing off tables good enough or petty crap like that …." The employer owner later questioned claimant about who at the restaurant she was referring to.

The employer owner sent claimant a text message on March 25, 2012 to keep her Face Book posts positive when referring to the business, and its customers. Claimant had made a reference to customer tipping. Claimant responded she did not name any customer or reference the business.

A friend notified the employer on October 2 about a claimant Face Book post stating another waitress was sleeping with the boss. Claimant later deleted the post. When confronted by the

employer owner, she admitted it. The owner admitted the sexual relationship with the waitress. The employer discharged claimant for the posted comment.

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 administrative law judge concludes the employer has failed to establish claimant was discharged for misconduct in connection with employment on October 2, 2012.

The employer had no written social network policy. It never issued any written warning to claimant regarding her Face Book use making references to posting comments about the business, its owner and/or employees. A written warning is used to establish the required standard of behavior especially when the employer has no written policy, and it makes it clear that a certain behavior will not be tolerated to the point of employment termination.

Job disqualifying misconduct is not established in this matter as the employer failed to warn claimant her job was in jeopardy due to Face Book posting, and the recent incident is not a clear violation of any policy.

DECISION:

The department decision dated October 17, 2012, reference 01, is reversed. The claimant was not discharged for misconduct on October 2, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson
Administrative Law Judge

_____
Decision Dated and Mailed

rls/pjs