

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CATHY A BEARBOWER
Claimant

APPEAL NO. 17A-UI-12559-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 11/05/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Kwik Trip (employer) appealed a representative's November 30, 2017, decision (reference 01) that concluded Cathy Bearbower (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 27, 2017. The claimant participated personally. The employer participated by Alicia Endelman, District Leader. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 8, 1995, as a full-time guest service leader. The claimant naturally speaks in a loud voice. The claimant may have signed for receipt of the employer's policy guide when she was hired. The policy guide was revised on December 11, 2006, and the Code of Conduct was revised on July 10, 2017. The July 10, 2017, Code of Conduct states that any violation of the Code of Conduct Policy will result in disciplinary action up to and including termination. An example of inappropriate behavior is listed as "[f]ailure to abide by generally accepted notions of civility, including engaging in abusive, threatening, or violent behavior."

On June 28, 2017, the district leader called the claimant and a co-worker in for a meeting. The claimant felt like she was being interrogated and wanted to ask the district leader questions. On June 30, 2017, the employer issued the claimant a written warning for interrupting, raising her voice, and having a threatening manner. The employer notified the claimant that she could be terminated from employment if she argued with a co-worker again.

On October 10, 2017, the claimant was trying to fix something in the kitchen after a tray accidentally fell on the floor. The kitchen was small and three people were working. Co-worker Barb started arguing with the claimant. Customers appeared to turn their heads at the sounds. Barb asked the claimant if it was necessary for the claimant to slam the trays. The claimant told

Barb she was not slamming the trays as she continued to work, handling bakery trays and containers. Barb approached the claimant, kicked paper on the floor, and said, "That's fucking bullshit". The claimant asked Barb if it was necessary to swear. Barb said, "You think you're so perfect". The claimant said something like "not until you came in". The assistant manager told the two that they were "kind of loud".

On October 12, 2017, the district leader met with the claimant after watching and listening to the recording of the incident on October 10, 2017. The district leader determined the claimant was slamming containers and trays in the kitchen from the audio recording. The visual recording did not show this. The employer told the claimant that the matter would be referred to the human resources department. Human resources received the matter on October 13, 2017. The claimant continued to work for the employer. On or about October 20, 2017, human resources told the district leader to terminate the claimant. The claimant went on vacation from October 20 to 29, 2017. On October 30, 2017, the claimant returned to work. At the end of her shift the district leader terminated her.

The claimant filed for unemployment insurance benefits with an effective date of November 5, 2017. The employer participated personally at the fact finding interview on November 29, 2017, by Alicia Endelman.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(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 in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). First of all, the employer did not establish that the claimant was provided with the revised Code of Conduct and Policy Guide. She was hired in 1995 and the handbooks have been updated since her hire date. If an employer wants an employee to follow specific rules, the employer must make certain the employee is given those rules.

Secondly, the claimant appears to have been terminated for a Code of Conduct violation. There was no evidence that the claimant was abusive, threatening, or violent. The district leader testified that the recording made it sound like the claimant threw things but it did not look like she threw things. There were at least three people who were in the kitchen, customers who watched, and an assistant manager who was nearby. Of all those people, only the claimant testified at the hearing. She is the only first-hand witness at the appeal hearing. The claimant's testimony supports the fact that Barb was uncivil and the instigator of unrest in the kitchen on November 10, 2017.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on November 10, 2017. The claimant was not discharged until November 30, 2017. The lapse of time between the incident and the termination is twenty days. The employer has failed to provide good cause for the lapse.

The employer did not provide sufficient evidence of job-related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's November 30, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs