IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CANDY L WRIGHT
Claimant

CRACKER BARREL OLD COUNTRY STORE INC
Employer

APPEAL NO. 09A-UI-00491-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/02/08 R: 01
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 2, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on January 28, 2009. Claimant participated. Employer participated through Scott Miller, Jeremiah Knutson, and Jodeen Clifford.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked part-time as a server and was employed from June 15, 2003 until November 5, 2008 when she was discharged. On November 1 claimant was tardy but worked without a break and took tables for Claudia, who was also tardy. About a half hour before her shift was to end shift supervisor Knutson assigned a group of 13 to two tables in her section and one table in each of two other servers' sections. Claimant helped push tables together to seat the party. New servers were coming on duty in a half hour and she was feeling overwhelmed because she still had other tables to wait on and clean up duties to perform before she could leave. She asked the other two servers if they would mind handling the tables without her and they agreed. Knutsen insisted she stay to wait on the group. The policy does allow a server to turn over an assigned table to another server at shift change if they introduce the new server to the table and relinquish their claim to tips from that order. She asked Knutsen for a chance to explain her reasoning multiple times and ultimately raised her voice in an attempt to be heard. He refused to listen and told her to go home but told her when asked that she was not fired. She asked for her tips accumulated that day and was told to wait for them outside. She reported to work the next day and Knutsen said nothing about the incident but was fired the following week by another manager who was not present on November 1. She had not been warned for similar issues in the past and had one warning for

attendance in late October for absences in earlier months but attendance and/or tardiness was not a stated reason for the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

Insubordination does not equal misconduct if it is reasonable under the circumstances. Balky or argumentative conduct is not necessarily disqualifying.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Had Knutsen given claimant a chance to explain her concerns, the situation would likely not have escalated. Given the totality of the circumstances, Knutsen's request was unreasonable and claimant's response is not considered insubordination. Furthermore, since employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The January 12, 2009, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending January 3, 2009 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css