IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CYNTHIA L DAVIDSON
Claimant

CATERING BY MARLIN'S INC
CBM FOOD SERVICE
Employer

APPEAL NO. 08A-UI-03081-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/04/08 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Catering By Marlin's (employer) appealed a representative's March 25, 2008 decision (reference 01) that concluded Cynthia Davidson (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 14, 2008. The claimant was represented by Glenn Metcalf, Attorney at Law, and participated personally. The employer participated by Melinda Groves, Regional Manager. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 March 18, 2007. She became a full-time manager.

On December 25, 2007, the cook ruined the Christmas meal. The claimant issued the cook a verbal warning. On January 2, 2008, the claimant asked her supervisor what she should do about the cook. The supervisor told the claimant that she should order something nice to make up for the ruined meal. The supervisor issued the claimant a written warning for failure to properly run the employer's operation and issue the cook a written warning. The supervisor was unaware the claimant had issued the cook a verbal warning.

On February 25, 2008, the employer demoted the claimant to bookkeeper. She was told to train the new manager. On February 25, 2008, the new manager informed the claimant there would be a meeting on February 27, 2008. The new manager did not work on February 26, 2008. On February 27, 2008, the claimant went to the meeting and stood in the doorway. After the meeting the claimant told the new manager that she was going to another location to perform

additional work for the employer. The following morning the employer terminated the claimant for not getting along with the new manager and not appearing at the meeting.

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:
>
> 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer had the power to present testimony of employees who attended the meeting but it did not do so. The witnesses present at the hearing were not at the meeting. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient

eyewitness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's March 25, 2008 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css