

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA L PUNTENEY
Claimant

APPEAL NO. 12A-UI-13622-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TA OPERATING LLC
TRAVEL CENTERS OF AMERICA
Employer

OC: 10/07/12
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 5, 2012, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on December 13, 2012. Claimant Brenda Puntenev participated. Ken Kjer of Employer's Edge represented the employer and presented testimony through Fred Davis, Field Manager. Exhibits One through Four were received into evidence.

ISSUE:

Whether Ms. Puntenev was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brenda Puntenev worked for the employer during two distinct periods. The second, most recent period of employment began in November 2011 and ended on October 1, 2012, when Fred Davis, Field Manager, discharged Ms. Puntenev from the employment. Mr. Davis was Ms. Puntenev's immediate supervisor during the most recent period of employment. During the most recent period of employment, Ms. Puntenev started as the full-time assistant manager at the employer's Council Bluffs restaurant and was promoted to general manager two months later.

The final incident that factored in the discharge was the weekly inventory that Ms. Puntenev and Assistant Manager Chrissy Wilkerson completed on September 30, which reflected weekly food costs that exceeded the 32 percent of revenue target by 5.1 percent. The inventory taken a week earlier had reflected food costs that exceeded the target by 5 percent. Ms. Puntenev believed there multiple potential reasons for the increase in food costs. These included problems with the meat count, low sales, high comps, and possible employee theft issues. Ms. Puntenev had taken preliminary steps to investigate the cause of the increase of food costs, but had not completed her investigation at the time she was discharged from the employment. Though the restaurant was open 24 hours a day, seven days a week, Ms. Puntenev and Ms. Wilkerson were the only two managers on staff. Due to lack of management staff, there

would regularly be times when there would be no manager on duty. Though the employer's policies required that cooler and freezer remained locked at all times, the manager's would not be able to control access to the cooler and freezer when they were off duty.

In making the decision to discharge Ms. Puntenev from the employment, Mr. Davis considered a trip he made to the restaurant at around 11:00 p.m. on September 23, 2012. Mr. Davis observed floors and equipment that needed to be cleaned. The equipment that needed to be cleaned included grills, grill hoods, vents, fryers, reach-in coolers, walk-in cooler and freezer, and the dish machine area. Mr. Davis did not know how long the floor and equipment had been in the condition he observed. All were to be cleaned daily. Mr. Davis also found the walk-in cooler and freezer unlocked.

In making the decision to discharge Ms. Puntenev from the employment, Mr. Davis considered allegations that two employees had brought forth about Ms. Puntenev. In June, Mr. Davis investigated a male employee's allegation that Ms. Puntenev had made sexually harassing comments directed toward the employee. After investigating, Mr. Davis concluded that Ms. Puntenev had not sexually harassed the employee. Mr. Davis counseled Ms. Puntenev to choose her words more carefully. On September 20, an employee alleged to Mr. Davis that a month earlier the employee had shared some pain pills with Ms. Puntenev. The employee further alleged that Ms. Puntenev subsequently became upset when the employee would not share pain pills. Ms. Puntenev denied the allegation. Mr. Davis had Ms. Puntenev submit to a drug test the yielded a result that was negative for drugs.

In making the decision to discharge Ms. Puntenev from the employment, Mr. Davis considered failure to accurately forecast weekly profits in August. Ms. Puntenev had forecast \$15,000.00, but the store produced \$10,800.00.

In making the decision to discharge Ms. Puntenev from the employment, Mr. Davis considered Ms. Puntenev's failure to timely "post" two invoices for food the employer's in-house supply division had delivered to the restaurant.

On September 23, Mr. Davis had issued a written warning to Ms. Puntenev about her failure to control food costs, for having monthly sales 10 percent lower than the same month the previous year, and for the condition of the restaurant on September 23. Mr. Davis indicated in the warning that he was placing Ms. Puntenev on a 45-day notice and that she needed to demonstrate improvement during that time. Rather than adhering to the 45-day notice, Mr. Davis, at the suggestion of the employer's human resources department, discharged Ms. Puntenev a week after issuing the warning.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While the evidence establishes that there were performance issues in the employment, the evidence does not establish misconduct in connection with the employment such as would disqualify Ms. Punteney for unemployment insurance benefits. The employer failed to present sufficient evidence to establish that the higher than acceptable food costs in September were attributable to carelessness, negligence or willful misconduct on the part of Ms. Punteney. It was this concern that served as the trigger for the discharge. The employer's staffing situation, with only two managers running a 24/7 restaurant, would seem to invite problems with food cost, food loss and so forth, during those times when no manager was scheduled. The evidence is insufficient to establish that the conditions Mr. Davis observed late in the evening on September 23 reflected the condition of the restaurant at other times. The weight of the

evidence does indicate that Ms. Puntenev was negligent in failing to timely post a couple invoices. The evidence is insufficient to establish that Ms. Puntenev's failure to accurately predict profits was attributable to carelessness, negligence, or willful misconduct on her part. The same can be said for food sales being down from the year before. The evidence fails to establish that Ms. Puntenev engaged in any misconduct in connection with the allegation of sexual harassment or the allegation with regard to the pain pills. The employer concluded through its own investigation that there was sexual harassment. The allegation regarding the alleged sharing of pain pills is suspect from the start, given the complainant's decision to wait a month before bringing the allegation to the employer's attention.

The evidence indicates that Ms. Puntenev was unable to perform to the employer's expectations. The evidence does not establish misconduct. Ms. Puntenev is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's November 5, 2012, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css