

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMY SPARBEL
Claimant

APPEAL NO. 09A-UI-03268-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIFTH DAY PEORIA LLC
Employer

**Original Claim: 01-18-09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 23, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 25, 2009. The claimant participated in the hearing. William Torchia, Managing Member, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time general manager for Fifth Day Peoria (TGI Fridays) from January 12, 2008 to January 16, 2009. She was discharged for “gross underperformance.” The employer testified the claimant had the highest turnover among managers and hourly employees in the history of the company. The claimant indicated that one of her managers was transferred to a different store but the rest remained intact and they hired too many employees while preparing to open the restaurant and the business did not warrant keeping all of the hourly employees, because the claimant could not give them enough hours and many left on their own as a result. The employer also alleged the claimant spent too much time in the office, but the claimant stated she spent four to five hours in the office on Tuesdays putting together the weekly numbers but otherwise she was out on the floor. The employer said the claimant had the highest amount of employee and guest complaints and the lowest guest satisfaction scores. The claimant countered that when she left, her guest satisfaction number was 67.9 percent and it was supposed to be at 70 percent. The restaurant was reviewed by the corporate office in October 2008 and received a rating of 91.2 percent. The employer did not issue any written verbal or written warnings to the claimant, because it does not believe in giving warnings to management personnel, as it considers written warnings to be “threats” rather than a tool to provide direction to the employee. Consequently, the claimant did not know her job was in jeopardy before she was terminated January 16, 2009.

REASONING AND CONCLUSIONS OF LAW:

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

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the employer alleges several areas where the claimant was deficient and failed to meet the employer's standards, it could not provide any dates when any event occurred and the claimant disagrees with their assessment and was not aware the employer was dissatisfied with her performance. Although the employer does not issue written warnings to management personal because it believes warnings are a threat, without warnings the manager is not aware of specifically what they are doing wrong and how to improve their performance to meet the employer's expectations. The claimant did not meet the employer's standards and expectations. The employer, however, did not warn her about her performance and the claimant was not aware her job was in jeopardy. Consequently, the administrative law judge must conclude that the

employer has not met its burden of proving disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The February 23, 2009, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw