

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JENNIFER K BOWERS
Claimant

APPEAL NO. 15O-UI-08831-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BEARPACK INC
Employer

OC: 09/07/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jennifer K. Bowers filed an appeal from an adjudicator's determination that was dated May 5, 2015, reference 06, which held that the claimant had left her employment with Bearpack Inc. voluntarily on February 25, 2015 under disqualifying conditions. Although the claimant's appeal had not been received timely, an administrative law judge telephone conference call hearing was scheduled for and held on June 30, 2015. The claimant appeared with one witness. Don Miller, the employer, appeared with one witness. The issue of the timeliness of Ms. Bowers' appeal was a notice of hearing issue and evidence was taken by the administrative law judge. On July 1, 2015, the administrative law judge entered a decision confirming the May 5, 2015, reference 06, decision finding that the claimant's appeal was not timely and that the decision of the representative would remain in effect. Ms. Bowers appealed the administrative law judge decision to the Employment Appeal Board. On August 5, 2015, the Employment Appeal Board reversed and remanded the matter back to the Appeals Section for an administrative law judge to hold a hearing on the merits and to issue an appeal decision.

In compliance with the Employment Appeal Board's remand order, notices were sent to the parties on the issues to be considered and a telephone conference hearing was held on August 27, 2015. The claimant participated personally. The employer participated by Mr. Don Miller, Owner and Ms. Ann Glass, Manager.

ISSUE:

The issue in this appeal is whether the claimant voluntarily left employment with good cause attributable to the employer or whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all the evidence in the record, the administrative law judge finds: Jennifer Bowers was employed by Bearpack Inc., doing business as Gilligans Pub, from February 11, 2015 until February 28, 2015 when the employer left Ms. Bowers a voice message stating in reference to the claimant's employment, "it's not going to work out." The message was left by Ms. Glass, the manager, and stated that the company owner had directed her to inform the

claimant. The claimant accepted the news and stated that she had not wanted to return to employment because of a previous incident.

Ms. Bowers had been hired to work part time as a bartender/cook and was paid by the hour. Her immediate supervisor was Ann Glass, the manager. Ms. Bowers last worked on Thursday night, February 26, 2015.

On February 26, 2015, the claimant was asked to work as a bartender/waitress because the facility was busy with karaoke and other activities. After finishing her waitress duties, Ms. Bowers remain visiting with her daughter and others. Because alcoholic drinks were being served at the table, the waitress who was waiting on the table asked to verify the ID of Ms. Bowers' daughter who was sitting at the table. When Ms. Bowers' daughter could not produce identification as it had been lost or misplaced. Although Ms. Bowers repeatedly attempted to confirm verbally that her daughter was of age, the verbal confirmation was not sufficient and Ms. Bowers' daughter was not served alcoholic beverages.

As time progressed it appears that the waitress became concerned that Ms. Bowers' daughter may have been drinking alcohol at the table that may have been ordered by others. The waitress informed Mr. Miller of the issue. Mr. Miller was in another area of the bar socializing with friends, as well. Based upon her belief that her daughter should not have to have personal identification to remain in a bar if food was being sold, Ms. Bowers contested the management decision that her daughter would have to leave the bar because there was being alcohol served there.

The final event that took place on the night of February 26, 2015, when both Ms. Bowers and Mr. Miller re-visited the ID issue on a stairway. Each renewed by spirit, or "spirits" vigorously and loudly debated the decision considering Ms. Bowers' daughter's ID. The parties were both shouting, not only to emphasize their point, but also because loud karaoke was taking place as well as the din of other bar activities. By the time each party finished exchanging their views, neither Ms. Bowers or Mr. Miller were happy with the way things were going. However, the employment relationship remained intact.

Ms. Bowers took no action, but had not wanted to return to employment because of the incident which she thought was a cool reception by other employees as a new worker. Mr. Miller believes that the claimant's conduct is unacceptable, believing that Ms. Bowers may have been trying to facilitate an underage person. The next contact between the parties took place on February 28, 2015. On that date the claimant was telephoned by Ms. Glass stating, "Don wanted me to call you and tell you it is not going to work out." Ms. Bowers received the message and did not report again for work.

It is the employer's position that Ms. Bowers quit her job by the statement she made to Mr. Miller during their verbal exchange February 26, 2015.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is whether the claimant quit employment or was discharged by the employer. The administrative law judge having carefully considered the evidence in the record concludes that the claimant was discharged by the employer prior to expressing any intention to quit employment. The second question is whether the evidence in the record establishes intentional misconduct in connection with the work sufficient to warrant the denial of unemployment insurance benefits.

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.

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).

In discharge cases, the employer has the burden of proof. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment insurance 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).

In the case at hand, the claimant initially disputed a decision that had been made by a waitress regarding whether the claimant's daughter could be served alcoholic beverages, or could remain in the facility after 7:00 p.m. in the evening. Ms. Bowers, at that time, was off duty and believed that the rule was that her daughter could remain in the facility without identification if food was being served. Ms. Bowers had also repeatedly offered to verbally verify that her daughter was of age. However, the employer had reasonably declined that offer. It appears that each party's sense of the importance of the issue had been heightened each time the issue was renewed. Each attributed that intent to the other for pushing the issue. The issue was finally revisited for the last time between Ms. Bowers and the bar owner when each person was raising their voice to be heard over karaoke and either could clearly hear everything that was

transpiring. Although the employment relationship remained intact, at the end of the exchange between Ms. Bowers, who was off duty, and the company owner who was socializing, although the employment relationship continued to remain intact both parties were dissatisfied. Although dissatisfied, Ms. Bowers took no action. The employer acted first two days later on February 28, the employer left a message clearly meant to inform the claimant that the employer was ending her employment. For these reasons the administrative law judge concludes the claimant was discharged by the employer.

The question before the administrative law judge in this case is not whether the employer has a right to discharge Ms. Bowers for these reasons or for no reason whatsoever. The question is whether the discharge took place under disqualifying conditions within the meaning of the Employment Security Law. While the employer's decision to discharge Ms. Bowers may have been a sound decision from a management viewpoint, the evidence in the record does not establish intentional misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. The final incident that caused the claimant's discharge took place when Ms. Bowers was off duty. Both parties were raising their voice to be heard over karaoke. The claimant's off-duty effort to have her employer see her viewpoint with respect to the ID issue may have irritated the owner but it did not rise to the level of intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated February 5, 2015, reference 06, is reversed. The claimant was discharged from employment under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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