

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORAH K MARTIN
Claimant

APPEAL NO. 10A-UI-05445-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

G M R I
OLIVE GARDEN
Employer

Original Claim: 02/28/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department decision dated March 30, 2010, reference 01, that held the claimant was not discharged for misconduct on March 2, 2010, and that allowed benefits. A telephone hearing was held on May 27, 2010. The claimant participated. Josh Keldorg, GM, participated for the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant began employment on November 28, 1994, and last worked for the employer as a part-time server on March 2, 2010.

The claimant experienced some frustration in serving her guests on the evening of February 24, 2010. The cooks failed to provide her with all the food ordered by the guests. Later, in the restaurant alley area, the claimant confronted manager Knapp with the statement that she could not work on Wednesday nights with the Mexican cooks, because of a communication barrier between her and the cooks to the point she could not make them understand the food orders. The employer considered the claimant's complaint as a violation of its discrimination policy, and the matter was referred to higher level management review. The employer discharged the claimant on March 2, 2010 for a violation of its discrimination policy. The claimant had no prior warnings for similar conduct.

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 administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on March 2, 2010.

Claimant admits making the statement to her manager referencing the "Mexican" cooks, but for the purpose of identifying with whom she was experiencing the communication problem. The claimant did not directly discriminate against the cooks other than to reference them by their national origin.

This is an isolated incident where the claimant used poor judgment, but, absent any prior warning for the same behavior, this does not rise to the level of job-disqualifying misconduct.

DECISION:

The department decision dated March 30, 2010, reference 01, is affirmed. The claimant was not discharged for misconduct on March 2, 2010. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw