

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**CONNIE DICKEY  
1205 DIVISION ST  
BURLINGTON IA 52601**

**FIRE MOUNTAIN RESTAURANTS INC  
c/o TALX UC EXPRESS  
PO BOX 1160  
COLUMBUS OH 43216-1160**

**Appeal Number: 05A-UI-03673-CT  
OC: 03/06/05 R: 04  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Fire Mountain Restaurants, Inc. filed an appeal from a representative's decision dated March 28, 2005, reference 01, which held that no disqualification would be imposed regarding Connie Dickey's separation from employment. After due notice was issued, a hearing was held by telephone on April 28, 2005. Ms. Dickey participated personally. The employer participated by Brian Nelton, Store Manager.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Dickey was employed by Fire Mountain Restaurants,

Inc. from July 19, 2004 until March 7, 2005 as a full-time server. On March 7, another server, Gene, was waiting on customers who were seated at a table assigned to Ms. Dickey. She approached him at the table and advised him that it was in her section and he replied that he had taken it over. Ms. Dickey went to locate a manager to advise of the problem. The customers at the table wanted to be served by Gene and, therefore, moved to a table in his section. Ms. Dickey later stated to customers at another table that Gene was a “no good, dirty snake.” Ms. Dickey was discharged the same day.

Ms. Dickey had received a previous warning after she told a coworker that she was going to “whoop” her if she learned that she had taken tips belonging to her. The warning was given on October 24, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Dickey was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The decision to discharge Ms. Dickey was based on what occurred on March 7. Although the employer alleged that she was screaming at customers and a coworker on this date, the evidence of record does not establish this contention. The incident occurred at approximately 4:30 p.m. when the restaurant was relatively empty. If Ms. Dickey had been screaming, one would expect a manager to have overheard it. Ms. Dickey did approach Gene to tell him he was in her section. However, the evidence does not establish to the satisfaction of the administrative law judge that she was loud or belligerent or that she attempted to involve the customers in her dispute with Gene.

Ms. Dickey acknowledged that she referred to Gene as a “snake” to other customers. She used poor judgment in maligning her coworker to customers. The fact that the customers were friends does not excuse the behavior. However, this lapse on her part did not constitute a substantial disregard of the employer’s interests or standards. For the above reasons, the administrative law judge concludes that the final act which triggered the discharge did not constitute an act of misconduct as that term is defined by law. Because there was no final act of misconduct, the administrative law judge is not free to consider other, past acts of misconduct. The conduct that brought about the warning of October 24, 2004 was too remote in time to be considered a current act in relation to the March 7, 2005 discharge date.

After considering all of the evidence and the contentions of the parties, the administrative law judge concludes that the employer has failed to establish disqualifying misconduct. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Benefits are allowed.

#### DECISION:

The representative’s decision dated March 28, 2005, reference 01, is hereby affirmed. Ms. Dickey was discharged but a current act of misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/pjs