IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TIFFANY HUSSMAN
Claimant

SCORNOVACCA PIZZA INC
Employer

APPEAL NO. 12O-UI-13563-WT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 4/29/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated May 25, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. This matter was originally heard before a different administrative law judge in July 2012. A decision was entered on July 24, 2012, which denied benefits. The claimant appealed and the Employment Appeal Board remanded the matter to the Appeals Bureau on November 15, 2012, after finding that the claimant was not afforded a full and fair opportunity to present her case. Upon remand, a telephone conference hearing was scheduled for and held on December 27, 2012. The prior hearing record was not reviewed by the undersigned and a new, de novo hearing was held. Claimant participated through Annette Miller, her mother. Employer participated by General Manager, Amy Vacco. Employer Exhibits One through Two were admitted into evidence, as well as Claimant Exhibit A.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant was employed as a part-time server from April 2011. She was discharged on April 30, 2012 by employer following a heated exchange with her boss, Amy Vacco. Ms. Vacco was angry after she came to believe that the claimant had not taken a message regarding a work-related phone call. The two had an emotional argument. Ms. Vacco ultimately accused the claimant of having alcohol on her breath and terminated her.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct. The claimant is not disqualified.

The employer had given the claimant a warning for showing up for work under the influence of alcohol in August 2011. The claimant signed that warning and acknowledged the truth of it, although in fairness, the document was not specific as to what the claimant had actually done. The employer, however, undeniably provided a final warning in that notice that if the claimant presented for work under the influence of alcohol, she would be terminated. The claimant understood this. A violation of this warning would certainly amount to misconduct under Iowa law.

The employer alleged that the claimant presented for work on two more occasions under the influence of alcohol. First on April 14, 2012, the employer alleged claimant presented for a mandatory meeting and admitted to Ms. Vacco's sister that she was under the influence. The employer, however, never confronted the claimant about this. Ms. Vacco testified that she planned to confront the claimant about it on April 30, until their argument occurred. The employer, however, has not met its burden of proof that the claimant was actually under the influence on April 14, 2012. There is simply not enough evidence in the record to support this finding. In particular, it simply does not make sense that the employer would allow the claimant to stay at the meeting and insult associates of the business after she admitted she was under the influence of alcohol, particularly since she had been given a final warning in August 2011. The claimant's testimony on this topic is found to be more likely. She testified that she was joking around with Ms. Vacco's sister before the meeting began and they had discussed whether the claimant had been drinking the night before. It is possible that the employer may have believed the claimant was under the influence based upon this conversation, but the requisite level of proof has not been demonstrated to legally establish the fact.

This case really hinges on whether the claimant presented for work on April 30, 2012, while under the influence of alcohol. Ms. Vacco testified that she planned to provide a new final warning to the claimant on April 30, for her conduct on April 14. Before this meeting could occur, however, the two had an altercation. Ms. Vacco testified that the claimant acted disrespectfully and smelled of alcohol similar to the two previous episodes she was allegedly intoxicated at work. The employer testified that April 30, 2012 was an extremely hectic and frustrating day. A cook had called off work and Ms. Vacco had to fill that role. Later, Ms. Vacco called her mother, who was involved with the business. Her mother was surprised that the claimant had not relayed a message to her. This clearly frustrated Ms. Vacco. While the two had dramatically different details of the events which followed, which are now quite stale, the one fact which is consistent is that Ms. Vacco was quite irritated she was not given a message from her mother and she confronted the claimant. The two had a heated argument and Ms. Vacco accused the claimant of smelling like alcohol and instructed her to go home.

There is no corroborating evidence of alcohol use of any kind. There was no eye witness testimony. There are no witness statements. There is not even a contemporaneous statement from the employer. Other than the allegation of the smell of alcohol, there is not even any other indication by the employer of impairment, such as blood shot eyes, slurred speech or staggering. The only other characteristic sited by the employer was the allegation that the claimant acted disrespectfully. Based upon the evidence presented, this appears to be more related to her disagreement with the employer's allegations than being under the influence of alcohol. The claimant's mother testified that she dropped the claimant off at work on April 30, and she recognized no signs of alcohol use. She further testified that she picked the claimant up after she was sent home from work and immediately took her to pick up job applications. She testified credibly that she would not have taken her daughter to get applications if she believed she was under the influence of alcohol.

Based upon the totality of evidence received at hearing, the employer failed to prove that the claimant was under the influence of alcohol on April 30, 2012.

DECISION:

The fact-finding decision dated May 25, 2012, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/tll