

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MOLLY C SCHALLAU
Claimant

APPEAL NO. 12A-UI-06426-W

**ADMINISTRATIVE LAW JUDGE
DECISION**

4 BROTHERS BAR & GRILL INC
Employer

**OC: 4/22/12
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated May 24, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on September 26, 2012. Claimant participated personally. Her sister, Abby Grundman-Guthrie, also testified on her behalf. Employer participated by Clint Kass, General Manager and Owner. Exhibit A was admitted into evidence.

ISSUE:

The issue in this matter is whether claimant voluntarily quit or whether she was discharged.

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 full-time server. She began employment on January 1, 2012. The claimant last worked for the employer on April 20, 2012. On that date, the claimant was working the lunch shift. She agreed to pick up a shift for a co-worker, Sherry Bates. Ms. Bates was scheduled to work in the bar that evening and claimant agreed to work for Ms. Bates with the caveat that she would be allowed to cover the more desirable closer shift in the bar section where the tips were generally larger. She explained this to the General Manager and Owner, Clint Kass. Mr. Kass explained to her that he would direct her work and that she could not dictate the terms of her employment. Ms. Schallau accused Mr. Kass of "having favorites." Mr. Kass indicated that it was a business decision based upon her skills sets. He told Ms. Schallau to go home because he was frustrated that she would not accept her role with the organization.

She never returned to work. The claimant believed that she was terminated. The employer believed the claimant quit. The next time the two spoke was when the claimant attempted to get her paycheck and that conversation went poorly.

REASONING AND CONCLUSIONS OF LAW:

The initial question raised in this case is the nature of the separation. Separations are categorized into four separate categories under Iowa law.

24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

See Iowa Administrative Code 871—24.1.

The nature of a separation is generally determined by ascertaining which party initiated the separation. If the employer initiated the separation, with intent to permanently sever the employment relationship, then the separation is generally considered a termination or layoff. If the claimant initiated the separation, with intent to permanently sever the employment relationship, then the separation is generally considered a quit.

It is the employer's initial burden to prove the nature of the separation. This is often extremely significant in many cases because the burden rests with the party who initiated the separation. If the employer initiated the separation, the employer then must prove misconduct (or another basis for disqualification). If the claimant initiated the separation, then the claimant must prove good cause attributable to the employer.

The evidence is contested. The employer, however, has not met its burden to prove that the claimant quit. The evidence which is in the record is not compelling. Mr. Kass testified that he sent claimant home on April 20, 2012. Importantly, the claimant's scheduled shift had not been completed when he sent her home. In other words, he did not merely disallow her from taking the additional shift, he ended her current shift and instructed her to leave. He clearly had a high level of frustration with the claimant. He testified that he told her to come back on Monday to discuss her employment situation. He did not set up a specific appointment time. He left it to her to get back with him, which she never did because she reasonably believed she was fired.

The fact that Mr. Kass never followed up with the claimant again strongly suggests that he was either intending to sever the employment relationship with claimant or he was hoping she would not follow up. In either event, the greater weight of the evidence established that the claimant

never manifested any intent to quit her employment. Even if this were a pure misunderstanding, the employer has the burden to prove the nature of the separation. Because of the burden of proof, the employer has a heightened obligation in circumstances such as these to be very clear and direct with a worker regarding their employment status. It is therefore found that the employer initiated the separation.

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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct. The claimant placed the employer in a very difficult position when she demanded that she be allowed to close and be assigned to the bar. An employer has the right to direct the work of its employees and Mr. Kass was within his right to direct the claimant's work. The claimant's actions, however, do not constitute misconduct as defined by Iowa law and the claimant is, therefore, eligible for benefits.

DECISION:

The fact-finding decision dated May 24, 2012, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/css