

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANNA K HOLLINRAKE
Claimant

APPEAL NO: 13A-UI-04228-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ICKEY NICKEL BAR & GRILL
Employer

OC: 03/10/13
Claimant: Appellant (1)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's March 29, 2013 determination (reference 01) that disqualified her from receiving benefits and held the employer's account exempt from charge because she had been discharged for disqualifying reasons. The claimant participated in the hearing. Janice Foster and James Foster, owners, and Monica McDonald, a cook, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is not qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in December 2007. She most recently worked 24 to 30 hours a week as bartender/server. Before the claimant worked as a bartender/server she worked as a manager. Managers are allowed to have cell phones with them at work, but the employer does not allow other employees to have a cell phone in their possession at work. In December 2012 or January 2013, the claimant told the employer she did not want to be a manager any longer. The employer granted this requested, but reminded the claimant she could no longer have a cell phone on her person when she worked. The employer's written cell phone policy is posted at work. As a manager, the claimant enforced the cell phone policy with employees she supervised.

The employer's video set up at work can be viewed by the Fosters at their home. On March 12, James Foster was home watching the video and saw the claimant using her cell phone to take a picture of a customer and that she left the bar unattended when she went outside to take a cigarette break. Since the claimant worked as a bartender/server, the employer talked to her several times about violating the employer's cell phone policy. The claimant continued to have her cell phone on her person when she worked as a bartender/server. The employer did not give the claimant any written warnings. The claimant admitted the employer talked to her several times about having her cell phone on her person and she understood the employer's policy did not allow bartenders/servers to have a cell phone on their person at work.

The claimant also knew and understood the bar was not to be left unattended. On March 12, McDonald told the claimant she could not watch the bar if the claimant went outside for a cigarette break. The claimant, however, left the bar unattended when a customer was present to take a cigarette break. McDonald was unable to watch the bar when the claimant went outside for a cigarette break because she was too busy doing her work in the kitchen.

On March 13, the employer asked the claimant why she had her cell phone at work the day before. The claimant had no explanation.

On March 15, the employer discharged the claimant for her March 12 conduct. Specifically the claimant had her cell phone on her person at work, during work hours she took pictures with her cell phone of a customer instead of performing cleaning duties and she left the bar unattended with a customer present to go on a cigarette break before 4 p.m.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant's conduct on March 12 amounts to work-connected misconduct. The claimant knew and understood that since she was no longer a manager; the employer did not allow her to have her cell phone on her person during work hours. Even though the employer talked to the claimant several times after the claimant became a bartender/server, she continued to have her cell phone on her person while working. The claimant intentionally made a decision to violate the employer's written cell phone policy.

The claimant also understood that the bar was not to be left unattended. Even though the claimant testified that McDonald agreed to watch the bar when the claimant went out for her cigarette break, McDonald refuted the claimant's testimony. Instead of agreeing to watch the bar when the claimant went outside, McDonald specifically told the claimant she could not help her out because she was too busy doing her work in the kitchen. Since the claimant knew the bar could not be left unattended, her motive for twisting the truth is greater than McDonald's motive. I find McDonald's testimony credible in that she told the claimant she could not watch the bar even for a few minutes. Again, the claimant decided it was more important to get her cigarette break than to make sure there was an employee watching the bar. The claimant's

decision to leave the bar unattended amounts to a substantial disregard of the employer's interests. Although the employer also discharged the claimant for failing to perform her cleaning duties, it is not necessary to go into this because the claimant knowingly violated the employer's cell phone policy and left the bar unattended. The claimant committed work-connected misconduct. As of March 10, 2013, the claimant is not qualified to receive benefits.

DECISION:

The representative's March 29, 2013 determination (reference 01) is affirmed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of March 10, 2013, this disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs