IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DIANE K JANZEN Claimant **HARVEYS IOWA MANAGEMENT CO INC** Employer	**APPEAL 20A-UI-00168-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/08/19** **Claimant: Appellant (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment
871 IAC 24.10 – Employer Participation in the Fact-Finding Interview

STATEMENT OF THE CASE:

Harveys Iowa Management (employer) appealed a representative's December 26, 2019, decision (reference 01) that concluded Diane Janzen (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 27, 2020. The claimant did not provide a telephone number where she could be reached and, therefore, did not participate. The employer was represented by Amelia Gallagher, Hearings Representative, and participated by Karen Barrientos, Unemployment Insurance Consultant, Tilinia Davidson, Unemployment Claims Specialist, and Salia Nazarie, Human Resources Manager.

The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 3, 2016, as a full-time restaurant attendant. She signed for receipt of the employer's handbook on August 3, 2016. The handbook contained a Code of Conduct and an Anti-Harassment Policy which contained the following statements: "Team Members are expected to use appropriate business decorum when communicating with others, generally comporting themselves with general notions of civility and decorum. Team Members must demonstrate courtesy, friendliness, and professional language/tone/manner/actions with guests and vendors. Team Members will not use language that is vulgar, patently offensive, or otherwise harassing of other people on any legally recognized protected basis in violation of the Anti-Harassment Policy". "Team members will use professional judgement and will refrain from acts of gross misjudgment, carelessness, negligence in the performance of one's job, or any serious conduct detrimental to the orderly

and ethical operation of the business; team members will not intentionally obstruct surveillance system equipment". The employer did not issue the claimant any warnings.

On December 3, 2019, the claimant and co-workers Roxanne and Norma were cleaning and finishing their work in the buffet area. They proceeded to the back area when the claimant asked Roxanne if the drink area was done. Roxanne shrugged and expressed a sarcastic demeanor. The claimant said they all had to work together as a team so they could go home. Roxanne became upset and started talking about a previous incident in which she thought the claimant had complained to a supervisor about her. She asked the claimant if she was jealous and used the word "fuck" a number of times and called the claimant a "fucking bitch". The claimant told Roxanne, "You need to shut your fucking mouth" three or four times. Using profanity at work out of the hearing of customers was not uncommon for employees, including supervisors.

The claimant left the area, went across the hall to the back stage restaurant area and knocked on the door of the supervisor. She told the supervisor, "You need to come say something to your cunt friend". The two returned to the buffet area, which was closed down. The claimant vented to the supervisor about Roxanne's behavior and said, "She thinks she's the queen bitch". The supervisor said that she had heard that from others but was not aware it was that bad.

Roxanne walked up to the two, put her face in the claimant's, and said, "If you ever call me that again…" The claimant asked what Roxanne was going to do, as it appeared to be a threat. Roxanne was hysterical and yelling. The claimant stood quietly by the drink station. The supervisor spoke with Roxanne for a while before sending her home. The claimant completed her shift and clocked out.

On December 6, 2019, the claimant next appeared for work and the employer took her statement. The employer told the claimant that it would conduct an investigation. It placed the claimant on suspension and took her employee identification. On December 7, 2019, the employer terminated the claimant for being involved in an argument with a co-worker on December 3, 2019, where vulgar language was used. Co-worker Roxanne was also terminated.

The claimant filed for unemployment insurance benefits with an effective date of December 8, 2019. The employer's representative received notice of the December 24, 2019, fact-finding interview on December 19, 2019. On December 24, 2019, Unemployment Claims Specialist Tilinia Davidson entered the data about the interview into the computer and sent information to Unemployment Insurance Consultant Karen Barrientos to notify the employer. On December 27, 2019, Ms. Barrientos sent the employer notice of the December 24, 2019, fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony or written statements but chose not to provide either. The only witness provided was a person who watched a silent video of the situation.

Clearly, the supervisor heard the claimant describe her co-worker's actions and was not offended by her language. In fact, the supervisor confirmed that she had heard similar statements about the co-worker. The supervisor was not available to be questioned about how many of those other employees had been terminated for telling the supervisor, in frank detail, about, the co-worker. The supervisor was not available to be questioned about the use of profanity by supervisors and subordinates in the work area when customers were not present. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 26, 2019, decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs