

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI B EASTWOOD

Claimant

APPEAL NO. 10A-UI-04513-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

**MARSHALLTOWN RANCH INC
PIZZA RANCH OF MARSHALLTOWN**

Employer

Original Claim: 02/21/10

Claimant: Respondent (2/R)

Section 96.5-1 – Voluntary Leaving

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Marshalltown Ranch, Inc. / Pizza Ranch of Marshalltown (employer) appealed a representative's March 16, 2010 decision (reference 01) that concluded Lori Eastwood (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on April 27, 2010. The claimant failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. Mike Flanagan appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 30, 2007. She worked full-time as an assistant/swing manager at the employer's Marshalltown, Iowa restaurant. Her last day of work was January 2, 2010.

The claimant had previously expressed interest in being able to serve as a delivery driver as needed. The employer had on various occasions had its insurance company check to see if the claimant could be covered to be allowed to drive, as it was known that the claimant had an unfavorable driving record. The answer that had come back from the insurance company was that the claimant could not be covered, and the employer informed the claimant that she was not allowed to make any deliveries for the employer. This was most recently reviewed with her within the last six months of 2009.

On December 27 the claimant did make a pizza delivery for the employer. While doing so, she was involved in a car accident, although she was not at fault. However, as a result, the fact of her making a delivery for the employer contrary to the directive to her that she could not make deliveries

became known to the employer. On December 28 or December 29, Mr. Flanagan, the area manager, gave her a verbal warning for the incident, and further advised her that if the insurance company or the company's owner was not satisfied that a warning was sufficient, she yet could be discharged. She was informed that the matter was still under review by the insurance company and the employer.

Before the insurance company or the owner came to any conclusions as to whether further action such as discharge might be necessary, on January 3, 2010 the claimant verbally informed the restaurant manager as well, as Mr. Flanagan, that she was going to go ahead and resign, offering to give a two-week notice, so her last day would have been January 17. The employer determined to waive the notice period, so January 2 became her last day.

The claimant did not establish a claim for unemployment insurance benefits until the week beginning February 21, 2010; as a result, her potential eligibility during the offered notice period is moot. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

The representative's decision concluded that the claimant's quit was not voluntary, but that she could either quit or be discharged, so that the separation would be treated as a discharge for which the employer would bear the burden to establish it was for misconduct. Iowa Code § 96.6-2; 871 IAC 24.26(21). Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The rule further provides that there are some actions by an employee which are construed as being a voluntary quit of the employment, such as where an employee believes she is going to be discharged but has not been told that in fact she is going to be discharged. 871 IAC 24.25. The employer did not tell the claimant she could either quit or be discharged; a decision as to whether the claimant might yet be discharged had not been made by the time the claimant resigned. A decision on the part of the claimant to quit because of the mere potential of being discharged is not the same as being given an ultimatum to choose either to quit or be discharged.

The claimant quit before learning whether the employer would decide to discharge her; therefore, the separation is considered to be a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. Leaving because a warning has been given is not good cause. 871 IAC 24.25(28). The claimant has not satisfied her burden. Benefits are denied.

In the alternative, even if this were treated as a discharge, the result would be the same. In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's choice to make a pizza delivery for the employer despite clear and unambiguous notice to her that she was prohibited from doing so shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's March 16, 2010 decision (reference 01) is reversed. The claimant voluntarily left her employment without good cause attributable to the employer. In the alternative, she was discharged for disqualifying reasons. As of February 21, 2010, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw