

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SANDRA R GUELAI  
2026 WESTSIDE DR  
COUNCIL BLUFFS IA 51501-1027**

**APPEAL NO. 09A-UI-13985-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ARAMARK FHC LLC  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

**APPEAL RIGHTS:**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

***Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

The grounds upon which such appeal is based.

**YOU MAY REPRESENT** yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**MICHAEL TULIS  
ATTORNEY AT LAW  
532 - 1<sup>ST</sup> AVE #300  
COUNCIL BLUFFS IA 51503**

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SANDRA R GUELAI**  
Claimant

**APPEAL NO. 09A-UI-13985-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ARAMARK FHC LLC**  
Employer

**OC: 08/16/09**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
871 IAC 26.9(8) – Discovery Sanctions

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the September 11, 2009 (reference 01) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 31, 2009. Claimant participated and was represented by Michael Tulis, Attorney at Law. Employer opted not to participate according to the recorded conversation with Tom Kuiper of Talx UCM Services, Inc. since the hearing was not on his calendar and he was not prepared to participate.

**ISSUE:**

The issue is whether sanctions should be imposed on employer's failure to respond to discovery request and claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: On October 15, 2009 the Appeals Section of Iowa Workforce Development (IWD) served claimant's discovery requests upon the employer, at its address of record indicated in the caption. As of December 15, 2009 no response or objection had been noted so a hearing notice on the claimant's motion for sanctions was issued to the parties at the addresses of record. Both parties responded and employer reported three witness names, a representative's name and their respective phone numbers. When the hearing was called, claimant and her attorney were available to participate and did so. Employer's representative indicated the matter was not on his calendar and he was not prepared to participate and acknowledged that the hearing would proceed without the employer.

Claimant most recently worked full-time as a cook and was separated from employment on August 19, 2009. Food director Scott Garey and regional director Jim Long, and human resources director Karen Franklin told her she was fired because of an incident on July 19, 2009 when Suzanne Gonzales, Colleen Jackson, and claimant were serving inmates a meal. Claimant was assigned to put butter and bread on trays and slide the tray to the next person

who would add food to the tray and so on. Claimant slid trays down the line at a rate to attempt keep up with employer established speed of filling ten trays per minute. One bumped another tray causing Gonzales to miss the spot where she put beans on the tray so she dropped the spoon and it splattered beans and she told claimant she was going to “kick her ass” and shook her fist at her. Claimant did not respond, but stood mute “in shock.” Employer fired her a month later.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the motion for sanctions is granted.

871 IAC 26.9(8)e provides:

(8) Upon application by any party or upon the presiding officer’s own motion, the presiding officer may impose sanctions for failure to make discovery; however, sanctions shall not be imposed without prior specific notice from the presiding officer of the contemplated sanction, opportunity to be heard, and, if necessary, further opportunity to cure its failure. The sanctions may include the following: . . .

d. The exclusion of the party from participation in the contested case proceedings.

Since employer did not respond or object to the discovery requests and has not shown a good cause reason for the failure to do so, claimant’s motion for sanctions is granted and the employer is excluded from participation in the hearing on the merits of the separation.

As to the merits of the separation, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

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). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The employer has not established that claimant engaged in any act of misconduct, current or otherwise. Benefits are allowed.

**DECISION:**

The September 11, 2009 (reference 01) decision is reversed. Claimant's motion for sanctions is granted. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending August 22, 2009 shall be paid to claimant.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs