

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**NICHOLE M FRANK**  
Claimant

**MA & PAS PIZZA INC**  
Employer

**APPEAL 20R-UI-03518-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/01/20**  
**Claimant: Appellant (2R)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(9) \_ Disciplinary Suspension  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The claimant/appellant, Nichole M. Frank, filed an appeal from the March 20, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that denied benefits. A first hearing was scheduled for April 13, 2020 but was dismissed after the claimant failed to participate. (See 20A-UI-02529-NM-T). Upon successful request for reopening to the Employment Appeal Board, the hearing was remanded to allow both parties an opportunity to participate. The parties were properly notified about the hearing. A telephone hearing was held on May 18, 2020. The claimant participated personally. The employer, Ma & Pas Pizza Inc., participated through Barbara Barnhardt, owner.

The administrative law judge took official notice of the administrative records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant suspended for reasons related to job-related misconduct sufficient to warrant a denial of unemployment benefits?  
Is the claimant overpaid benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a Pizza Ranch restaurant. The claimant was employed as a crew member. She last worked on January 30, 2020. She was suspended without pay January 31, 2020 and discharged from employment on May 7, 2020. The issue of the claimant’s permanent separation from employment has not yet been addressed by Benefits Bureau.

On January 23, 2020, the claimant was arrested while off duty, for possession of drugs-methamphetamine and for possession of drug paraphernalia. She was suspended on January 31, 2020 pending disposition of charges. At the time she was suspended, she had not

yet entered a plea in the charges. After the suspension, one charge was reduced and she pled guilty to the other charge as part of a plea deal.

Prior to the initial decision which denied benefits to the claimant, she received \$1,245.00 in regular unemployment insurance benefits from March 1, 2020 until April 4, 2020. She did not receive any federal benefits through Federal Pandemic Unemployment Compensation.

#### **REASONING AND CONCLUSIONS OF LAW:**

**For the reasons that follow, the administrative law judge concludes the claimant is eligible for benefits while she was on a disciplinary suspension.**

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Sheryl A. Cospers vs. Iowa Department of Job Service and Blue Cross of Iowa*.

For purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct must be resolved. 871 IAC 24.32(9).

Iowa Admin. Code r. 871-24.32(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.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cospers v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa

Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77-78.

The claimant was criminally charged with possession of drugs and drug paraphernalia while off-duty. The administrative law judge is persuaded the claimant knew or should have known her off-duty conduct could impact her employment. At the time of her suspension, there is no evidence she had entered a plea to the charges and was, therefore, entitled to the presumption of innocence. While the claimant may have later pled guilty to charges stemming from the January 23, 2020 arrest, *at the time of suspension*, the employer made the decision to suspend, relying upon the arrest only. Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016) (citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)).

The question before the administrative law judge in this case is not whether the employer had the right to suspend this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to suspend the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's suspension was due to job-related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is allowed benefits, issue of overpayment is moot.

The issue of the claimant's permanent separation from employment effective May 7, 2020, is remanded to the Benefits Bureau for an initial decision and determination.

**DECISION:**

The unemployment insurance decision dated March 20, 2020, (reference 01) is reversed. The claimant was not suspended for reasons related to job-related misconduct. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits.

**REMAND:** The issue of the claimant's permanent separation from employment effective May 7, 2020, is remanded to the Benefits Bureau for an initial decision and determination.



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Jennifer L. Beckman  
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May 22, 2020  
Decision Dated and Mailed

jlb/scn