

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PRESTON R MALFERO**  
Claimant

**APPEAL NO: 18A-UI-11384-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KINSETH HOTEL CORPORATION**  
Employer

**OC: 10/14/18**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Kinseth Hotel Corporation, the employer filed a timely appeal from a representative's unemployment insurance decision dated November 15, 2018 (reference 03) that held Preston R. Malfero eligible to receive unemployment insurance benefits, finding that he was dismissed from work on October 19, 2018 for no disqualifying reason. After due notice was provided, a telephone hearing was held on December 6, 2018. Claimant participated. Employer participated by Ms. Audria Gale, Hearing Representative, Employer's Unity and witness Mr. Shawn Chapman, Food and Beverage Manager.

**ISSUE:**

The issue is whether the claimant was discharged for intentional work-related misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Preston Malfero began employment with Kinseth Hotel Corporation on November 3, 2017. Mr. Malfero worked as a full-time kitchen supervisor, working 3:00 p.m. until 11:00 p.m. and was paid by the hour. Claimant's immediate supervisor was chef Chad Thremala. Mr. Malfero was discharged on October 19, 2018 based upon the employer's conclusion that he had inappropriately responded to complaints about improperly cooked food and because he failed to properly supervise a new cook on the evening of October 16, 2018.

On the evening of October 16, 2018, Mr. Malfero and a newly hired cook were the only food preparation workers on duty that night. Along with normal supervisory duties, Mr. Malfero had also been assigned to banquet preparation work.

At about 6:30 p.m. that evening, Mr. Malfero went outside for an authorized cigarette break. The other cook that Mr. Malfero was to train, remained in the kitchen doing food preparation. After a few minutes, the other cook unexpectedly joined Mr. Malfero outside. Simultaneous with the new cook's arrival, Mr. Malfero received a telephone call from a front supervisor stating

that there was no one in the kitchen area and that there were food service issues. Mr. Malfero sent the cook back to the kitchen, and soon joined him there.

As Mr. Malfero returned to the kitchen area, staff began to bring back three guest orders that had been sent out by the new cook but sent back by patrons. Mr. Malfero responded by cooking a new steak for the patron. The claimant substituted a different variety of fish to please that patron. Mr. Malfero had stated to a server that it would take 10 to 15 minutes to replace the steak order because of the number of orders arriving. Mr. Malfero continued to assist the new cook the remainder of the work shift. He heard nothing further until October 19, 2018 when he reported to work and was informed that he had been discharged. Other employees had told the manager that the claimant had refused to cook a new steak, had re-heated it and had refused to provide new side dishes.

Because other employees had stated that Mr. Malfero did not follow the policy on refreshing food and asserted that both the new cook and Mr. Malfero were outside together, the employer concluded that Mr. Malfero was not properly supervising the kitchen and a decision was made to terminate Mr. Malfero from his employment. The employer did not question the claimant or give him an opportunity to present his side of what had taken place. Based upon the claimant's previous verbal warnings and the company's goal of satisfying clients, the employer concluded that it was in the company's best interest to separate Mr. Malfero from his employment.

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

The question before the administrative law judge is whether the evidence in the record establishes intentional disqualifying work-related misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper 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). The law limits disqualifying misconduct to substantial willful wrongdoing or repeated careless or negligence that equals willful misconduct in culpability. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

While hearsay is admissible in administrative proceedings, it cannot be accorded equal weight as sworn, direct first-hand testimony, providing that the first-hand testimony is credible and not inherently improbable.

In the case at hand, the employer has relied on evidence that is primarily hearsay to establish that Mr. Malfero's conduct was in willful disregard of the employer's interests and standards of behavior. The employer uses hearsay to establish the claimant had allowed a kitchen cook to go on break at the same time that Mr. Malfero was on break, and that the claimant had been rude to a server, and failed to follow proper procedures when re-cooking meals. The claimant, in his first-hand sworn testimony denies that he failed to follow cooking procedures. Mr. Malfero testified that he did not microwave the steak, but that he had cooked a new steak on the grill and provided two new entrees for that order. He testified that the issue with the fish dish was because of the patron's desire for a different kind of fish, and not due to an issue of over or under cooking. Mr. Malfero further testified that he had only explained that because of the sudden volume of business, he told the waitress there would be a 10 to 15 minute delay in cooking a new steak for the patron. Mr. Malfero appears to be a credible witness and his testimony is not inherently improbable. The administrative law judge gives more weight to the claimant's sworn, first-hand testimony in this matter.

The question in this case is not whether the employer had a right to discharge Mr. Malfero for these reasons, but whether the discharge is disqualifying under the provisions of the Iowa Employment Security law. While the decision to terminate Mr. Malfero may have been a sound decision from a management viewpoint, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing intentional, disqualifying work-

related misconduct sufficient to warrant the denial of job insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's unemployment insurance decision dated November 15, 2018, reference 03 is affirmed. Claimant was dismissed under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

tn/scn