

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RAFAEL ROGEL**  
Claimant

**APPEAL NO: 18A-UI-08738-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KEARANA INC**  
Employer

**OC: 07/29/18**

**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Kearana Inc, the employer filed a timely appeal from a representative's unemployment insurance decision dated August 15, 2018, (reference 01) which held claimant ineligible to receive unemployment insurance benefits finding that the claimant was dismissed from work on July 31, 2018 and finding that the record did not show willful or deliberate misconduct. After due notice was provided, a telephone hearing was held on September 7, 2018. Although duly notified, the claimant did not participate. The Employer participated by Mr. Kent Millsap, Owner/CEO.

**ISSUE:**

The issue is whether the claimant was discharged for work-connected 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: Rafael Rogel was employed by the captioned employer dba Casa Las Gloras for approximately one year before his separation from employment on July 31, 2018. Mr. Rogel was employed as a full-time server and paid by the hour. His immediate supervisors were Kent Millsap and Anna Millsap.

Mr. Rogel's employment with Casa Las Gloras came to an end on July 31, 2018 when the claimant was told to "punch out and go home" by Mr. Millsap and then his name was removed from the company work schedule by Anna Millsap, after her husband had not allowed Mr. Rogel to finish his work shift and told him to leave on July 31, 2018.

After being sent home, Mr. Rogel checked social media where the employer posted employees scheduling and saw that his name had been removed by the company owners. It appears that Mr. Rogel then sent a text message to a long-term employee who was familiar with the employer's practices. She confirmed to Mr. Rogel her belief that his removal from company scheduling meant that he had been discharged.

Mr. Millsap believed that the claimant was under the influence of alcohol, recreational drugs, or some other form of intoxicant when Mr. Rogel reported to work on July 31, 2018, because the

claimant was making service and billing mistakes. The restaurant was busy and under-staffed. Mr. Millsap first attempted to assist Mr. Rogel with service and billing issues for a period of time, but made a decision to tell Mr. Rogel to leave when Mr. Rogel continued to make mistakes. Mr. Millsap believed that he had detected some slurring of the claimant's speech and later found a partially consumed bottle of beer and suspicioned that it was the claimant's. Mr. Millsap asserts that he did not intend to discharge the claimant, but merely to send him home for the remainder of the shift, and he thought that the claimant would know that he was only being temporarily suspended and that he would later report back to work to explain his behavior. The claimant was removed at that time from the company schedule by Mr. Millsap's wife, although Mr. Millsap did not instruct his wife to remove the claimant from company schedule.

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

The next question before the administrative law judge is whether the evidence in the record establishes work-connected misconduct on the part of the claimant 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).

In the case at hand, the employer had a suspicion that the claimant might be under the influence of alcohol or controlled substances because the claimant made mistakes at work and the employer believed that he had detected a slur in the claimant's speech. The claimant was

not allowed to finish his work shift but was sent away by the employer without being given any additional information telling the claimant that he should report back later, or otherwise continue in employment. These acts commonly mean that a person has been discharged. The employer also removed the claimant's name from posted work schedule. A long-term employee also verified to Mr. Rogel that these actions generally mean he had been discharged from work. Employer was aware Mr. Rogel's name had been removed from the current schedule and was aware that the claimant had communicated with a long-term employee about his status, and did not contact the claimant to clarify any intention on the part of the employer to continue the employment relationship. The administrative law judge concludes that the claimant was reasonable in concluding that he had been discharged from employment.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000).

In the case at hand, the claimant was discharged based upon the employer's suspicion that the claimant was either drunk or under the influence of a controlled substance or in some other way intoxicated. The employer suspicion was not confirmed by any independent source, testing or admission by the claimant.

Iowa Code Section 730.5 sets forth the rules by which a private company may screen or test an employee for the use of illegal drugs or alcohol. In this matter, the employer did not have a testing policy in place and there was no direct evidence to establish that the claimant was under the influence of intoxicants at work. The employer's decision was based substantially on suspicion that the claimant's poor performance was related to the use of alcohol or drugs.

Mr. Rogel's discharge from employment may have been a reasonable decision under the circumstances, however the employer has not sustained its burden of proof to establish job-related misconduct sufficient to warrant the denial of job insurance benefits. Although the use of alcohol or drugs is not condoned or sanctioned, the evidence in this case is not sufficient. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's unemployment insurance decision dated August 15, 2018, reference 01 is affirmed. Claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

tn/scn