IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT E ABEGG
Claimant

ROGERS ENTERTAINMENT
LEGENDS AMERICAN GRILLE
Employer

APPEAL NO. 08A-UI-01113-S2

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/30/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Robert Abegg (claimant) appealed a representative's January 22, 2008 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Legends American Grille (employer) for conduct not in the best interests of the employer. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held in Des Moines, Iowa, on February 25, 2008. The claimant participated personally. The employer participated by Meg Williams, General Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired in June 2004, as a full-time server. The claimant was issued no warnings during his employment. The employer allowed an employee to drink at the bar after his shift was finished if he changed into other clothing. Often the claimant sat at the bar after the bar was closed and waited for the bartender to get off work so they could leave together. Other employees did the same. Sometimes a worker would go behind the bar, get a beer and pay the bartender.

On December 31, 2007, the manager told the claimant that he was "no where near done". The claimant responded by saying, "Quit being such a bitch". The claimant apologized repeatedly but the manager ignored the claimant. The manager was drinking alcohol while working. The claimant completed his shift at about 12:30 a.m. on January 1, 2008. He ordered beer and drank at the bar until he got up to go to the bathroom. The bartender thought the claimant left and poured out the rest of the claimant's pitcher. The claimant returned, went behind the bar to get a beer and paid for it. Employees regularly went behind the bar to get a drink. The manager told the claimant to get out from behind the bar and the claimant complied.

At 1:20 a.m. on January 1, 2008, the bartender announced “last call”. The claimant continued to wait at the bar for the bartender as he had done in the past. The manager asked him to leave at about 1:45 a.m. The claimant left within minutes of the request.

On January 1, 2008, the employer terminated the claimant for being in the bar after 2:00 a.m. on January 1, 2008, making an improper comment to the manager and going behind the bar to get a drink.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 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.

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). 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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer’s interests. Henry v. Iowa Department of Job Service, 391 N.W.2d 731 (Iowa App. 1986). Repeated unintentionally careless behavior of claimant towards subordinates and

others, after repeated warnings, is misconduct. Greene v. Employment Appeal Board, 426 N.W.2d 659 (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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Apart from the inappropriate comment the claimant made to the manager, the employer terminated the claimant without warning for engaging in behavior that is accepted in this employer's workplace. The comment represents a single incident of careless behavior. The claimant's single comment to the manager does not constitute misconduct. The employer provided no evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 22, 2008 decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs