

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TANIA L ROCHA
Claimant

APPEAL NO. 12A-UI-12743-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ELMORE FOODS LLC
Employer

OC: 10/07/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated October 23, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on November 27, 2012. Although notified, the claimant did not participate. The employer participated by Ms. Tabetha Davis, Manager.

ISSUE:

The issue in this matter is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Tania Rocha was employed by Elmore Foods LLC, doing business as Famous Dave's, from March 21, 2010 until October 7, 2012 when she was discharged from employment. Ms. Rocha worked as a part-time server and was paid by the hour.

The claimant was discharged based upon the result of an anonymous customer survey that had indicated that Ms. Rocha had provided unsatisfactory service.

An anonymous survey response was received by the company that indicated that an unnamed guest did not believe that Ms. Rocha's service had been adequate. Because the claimant had been previously warned about her service, a decision was made to terminate Ms. Rocha from her employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes 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:

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 this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

In this matter the evidence in the record establishes that the claimant was discharged based upon an anonymous server result that had indicated that the claimant had not met the

employer's minimum score for satisfactory service. The evidence also establishes that the claimant had previously been warned about her service level.

The employer's witness who was called by the employer to replace another witness who was not available but was unable to testify with any specificity as to the exact levels of unsatisfactory service and the types of services that were unsatisfactory and was unable to provide any identifying information about the service survey results.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for this reason but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Ms. Rocha may have been a sound decision from a management viewpoint, the evidence in the record is insufficient to establish intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. The employer's witness was unable to provide the name of the complainant, the types of complaints or the levels of dissatisfaction that were received in the service survey that caused the claimant's discharge. For these reasons the administrative law judge concludes that the evidence in the record is not sufficient to establish intentional disqualifying misconduct.

DECISION:

The representative's decision dated October 23, 2012, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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