

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIARAH R WRIGHT
Claimant

MORROWCO LLC
Employer

APPEAL NO. 12A-UI-13096-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/18/11
Claimant: Respondent (1)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated October 24, 2012, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 26, 2012. The claimant was present personally. The claimant was represented by Elizabeth Norris, Attorney at Law, Legal Aid. The employer was present by Todd Morrow, Owner. The record consists of the testimony of Tiarah Wright; the testimony of Todd Morrow; Claimant's Exhibits A-E; and Employer's Exhibits 1-11.

ISSUE:

Whether the claimant was separated from her employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns two restaurants known as The Pita Pit. One restaurant is located in downtown Iowa City and the other restaurant is located in Coralville, Iowa. The claimant was initially hired to work at the Coralville store. She was promoted to manager in late February or early March of 2012. She was a full-time employee. Her last day of work was October 5, 2012. She was terminated on October 7, 2012.

The claimant was terminated because the employer received complaints concerning customer service at the Coralville store. One complaint was dated August 27, 2012. (Exhibit 9) A second complaint was dated September 6, 2012, and came from Bakeris Family Chiropractic. (Exhibits 9 and 10) One customer complained about too little lettuce on the pita and the second complaint was that the sandwiches were "dry, cold and flavorless." (Exhibit 11) Rudeness by the workers was also mentioned. Both complaints were sent to the corporate headquarters and in turn sent to Mr. Morrow, who owns the restaurant. Mr. Morrow gave the claimant a disciplinary report dated September 10, 2012. She was cited for "inappropriate behavior toward

customer.” (Exhibit 8) The report stated that it was “clear that her duties are not being performed correctly.”

The corporate headquarters did a “secret shop” of store on or about October 5, 2012. The store scored 47.75% overall with customer service at 76.47%. (Exhibit 3)

The claimant was terminated by email on October 7, 2012.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The

legal definition of misconduct excludes unsatisfactory job performance or simple negligence. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The employer was specifically asked whether the claimant was terminated for unsatisfactory job performance and he replied yes. Mr. Morrow testified that he had received four complaints about the store and then received the secret shop report. He decided that it was time to part ways with the claimant. A careful review of the complaints shows nothing that was specifically directed at the claimant. Complaints about quality of food and “rudeness” are very subjective and are a tenuous basis for concluding that a discharge was due to disqualifying misconduct. The administrative law judge concludes that the claimant was discharged because the employer was dissatisfied with her performance as manager of the store.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual’s ability to do the job is required to justify disqualification, rather than accepting the employer’s subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer produced no evidence that the claimant intentionally gave poor customer service. Accordingly, no disqualification pursuant to Iowa Code section 96.5(2)a is imposed. Benefits are allowed if the claimant is otherwise eligible.

The employer stated that its address was not correct. The administrative law judge explained that she could not change the employer’s address. The employer agreed to do so. If the employer wishes to change its mailing address please access your account at <https://www.myiowaui.org/UITPTaxWeb/>.

DECISION:

The decision of the representative dated October 24, 2012, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css