IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TY L CHRISTENSEN Claimant **DIAMOND JO WORTH LLC** Employer	**APPEAL 15A-UI-13652-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/08/15** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 1, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 4, 2016. Claimant participated. Claimant registered Rick Rice and Jason Schroeder as witnesses on his behalf prior to January 4, 2016. Claimant did request via e-mail on January 4, 2016 a subpoena for Mr. Rice and Mr. Schroeder because he did not think that they would testify without a subpoena. When Mr. Rice and Mr. Schroeder were contacted by this administrative law judge, the director of human resources, Brandy Kozlowski stated that they were both allowed to testify. Rick Rice participated on behalf of claimant. Jason Schroeder disconnected from the hearing prior to giving testimony and did not answer when he was contacted to reconnect him to the hearing. The employer participated through representative, Thomas Kuiper, director of human resources, Brandy Kozlowski, restaurant and beverage manager, Tonya Davis. Director of food and beverage, Dave Barnes attended the hearing on behalf of the employer but did not testify.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a beverage supervisor from May 28, 2011, and was separated from employment on November 6, 2015, when he was discharged.

On November 6, 2015, Ms. Kozlowski called claimant down to her office regarding his actions over the previous weekend. Ms. Davis was also present for the meeting. The employer had received a complaint from a bartender that she did not receive any breaks on October 30, 2015 when she worked; she should have received a meal break and two fifteen minute breaks. The bartender also said there were problems getting breaks on October 31, 2015. Prior to claimant coming to the office on November 6, 2015, Ms. Kozlowski reviewed surveillance video from October 30, 2015. On October 30, 2015, claimant was in his office over four hours of his shift. On Friday nights, supervisors are a working supervisor and should be out on the floor a majority

of their shift. When individuals are on break, the supervisor would cover for them at the bar. After reviewing the video, Ms. Kozlowski observed that the bartender never received a break on October 30, 2015. On November 6, 2015, Ms. Kozlowski and Ms. Davis asked claimant why he was in his office for such a long period of time. Claimant was not assigned any office duties and was expected to be on the floor observing guests and covering for employees that were on break. Ms. Davis just wanted claimant to explain why he was in the office and claimant would not answer. Claimant got increasingly angry and upset that they were questioning his job. Claimant was clinching his fist and scooted himself in his chair trying to intimidate Ms. Kozlowski and Ms. Davis. This was making Ms. Kozlowski and Ms. Davis concerned. Claimant was raising his voice and getting agitated with Ms. Kozlowski and Ms. Davis. Claimant was telling them how hard he was working, but did not say why he was in the office so long. Ms. Kozlowski kept telling him to calm down. Ms. Kozlowski then told claimant he was suspended pending investigation and asked him to leave. Prior to the start of the meeting, Ms. Kozlowski had asked security to be close in case the meeting went bad. Security escorted claimant off the property. On November 9, 2015, claimant was discharged for his conduct during the November 6, 2015 meeting.

On March 28, 2015, claimant received a verbal warning, which was documented in writing, for unprofessional behavior. Claimant was making unprofessional comments towards a co-worker in front of customers. On April 4, 2015, claimant signed the verbal warning. Claimant was warned that any further violations could result in discharge.

The employer has a written policy that prohibits in appropriate behavior. Claimant was aware of this policy when he received the employee handbook. The employer has a progressive disciplinary policy, but the employer may skip steps.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Failure to sign a written reprimand acknowledging receipt constitutes job misconduct as a matter of law. *Green v Iowa Dep't of Job Serv.*, 299 N.W.2d 651 (Iowa 1980).

On November 6, 2015, claimant met with Ms. Davis and Ms. Kozlowski regarding an incident that took place the prior weekend. Claimant's argument that he did not raise his voice or get agitated during the meeting is not persuasive. Ms. Kozlowski testified, and Ms. Davis agreed, claimant got agitated during the meeting. They felt claimant was trying to intimidate them by clenching his fists and scooting up in his chair. Claimant refused to answer their questions about what he was doing in the office for so long and got upset that they would question him about his job. Ms. Kozlowski had to ask claimant to calm down and eventually told him he was suspended pending an investigation. Claimant was then escorted out of the building. Furthermore, even though Mr. Rice testified he did not hear any raised voices coming from the meeting; Mr. Rice testified that he was ten to fifteen feet away with Mr. Schroeder and the door to the office was closed. Mr. Rice did not believe the door and the walls would be easy to hear through. Claimant had also been given a prior warning for unprofessional conduct.

The employer has presented substantial and credible evidence that claimant exhibited unprofessional conduct and tried to intimidate Ms. Kozlowski and Ms. Davis on November 6,

2015. Claimant was clenching his fist and raising his voice towards Ms. Kozlowski and Ms. Davis. The employer has a duty to protect the safety of its employees. Claimant's conduct was contrary to the best interests of the employer and the safety of its employees. Benefits are denied.

DECISION:

The December 1, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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