

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHELLY J MCCULLOUGH
Claimant

J & D RESTAURANTS 2 INC
Employer

APPEAL 19A-UI-07203-CL

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/11/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

On September 10, 2019, the claimant filed an appeal from the September 4, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A hearing was held in Des Moines, Iowa, on October 4, 2019. Claimant participated personally and was represented by Keith Kreiman. Travis Easton testified. Employer participated through director of operations Kristy Young. Claimant's Exhibit A was received. Employer's Exhibit 1 was received.

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: Employer owns and operates McDonald's franchises. Claimant has been working at the McDonald's store in Osceola, Iowa, since 1998. Employer purchased the store on June 8, 2013, and retained claimant as an employee. Claimant most recently worked as a full-time crew person.

Around 20 years ago, claimant was diagnosed with arthritis in her feet. A treating chiropractor noted that claimant's gait pattern was severely altered when she began coming for treatment on August 20, 2019. For the last four years, claimant has not been able to use the muscle in her left shoulder. Claimant also has complete hearing loss in her right ear.

During the last few years of claimant's employment, other employees have frequently complained to management that claimant is bossy and rude in the workplace. Claimant does speak loudly because of her hearing loss, but claimant also micromanages her colleagues in an abrasive manner.

During her last six months of employment, operations manager Kristy Young counseled claimant about being abrasive toward her co-workers on at least six occasions. Young told claimant that she wanted her to improve and that she did not want to terminate her employment.

Claimant had particular difficulty getting along with a fellow crew member named Tami. When Tami first began working at the Osceola store, claimant often called Tami by her sister's name, Kathy. This bothered Tami. In July 2019, Tami and claimant had a conversation and claimant thought they had worked out their differences.

Employer may have up to 20 people at a time working in its kitchen during a busy shift. The kitchen is not a large space and employees often bump into one another. Most of the time, employees apologize when they bump into another person.

On August 1, 2019, claimant accidentally bumped into Tami and did not apologize.

On August 5, 2019, claimant accidentally elbowed Tami and did not apologize.

On August 7, 2019, claimant accidentally bumped into Tami by the drink area and did not apologize. Claimant was filling drinks even though Tami had been assigned to do so. Tami became frustrated and clocked out and left.

On August 8, 2019, Tami submitted a resignation notice via text message. Operations manager Kristy Young called Tami in to the store and spoke with her about the issue. Tami felt claimant was intentionally running into her.

On August 9, 2019, employer terminated claimant's employment.

On October 15, 2017, employer gave claimant a disciplinary action form for being rude and abrasive toward a manager.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason.

Iowa Code § 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 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.

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).

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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 Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, employer established that claimant was abrasive toward and micromanaged the other employees who worked at the store with her. Employer terminated claimant because it believed claimant took it a step too far by intentionally running into her co-worker, Tami, multiple times during early August 2019. The administrative law judge finds it likely that claimant did run in to or bump Tami on August 1, 5, and 7, 2019. This case turns on whether claimant did so intentionally.

Claimant testified that she has health problems which cause her to be unsteady and could have led her to unintentionally bump into co-workers, including Tami, in the kitchen. Claimant provided a note from her chiropractor affirming claimant had an unsteady gait during the time period in question. Claimant asserts she never bumped into Tami intentionally.

Employer asserts claimant ran into Tami intentionally. However, employer did not present any firsthand witnesses to the encounters. Tami still works for employer and so do other managers and employees who were witness to the incidents. Yet employer did not provide any firsthand testimony from any of these individuals. Employer also has surveillance footage, which it could

have provided as evidence in the hearing, but did not. Although employer asserted that another manager, Steven Blackwood, reviewed the footage and saw claimant intentionally elbowing Tami on August 5, 2019, the written statement by Blackwood submitted as evidence stated that he "could not seem to find [the incidents] on camera."

This case comes down to credibility. The administrative law judge finds claimant more credible because she was a firsthand witness to the encounters. Although employer had firsthand evidence it could have provided for the hearing, it chose not to do so.

Employer failed to establish claimant intentionally bumped into Tami, and therefore failed to establish claimant was terminated for job-related misconduct.

DECISION:

The September 4, 2019, (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

cal/scn