

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONI A VEZEAU
Claimant

APPEAL NO. 07A-UI-04554-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JS VENTURES INC
APPLEBEE'S NEIGHBORHOOD GRILL
Employer

OC: 03/25/07 R: 01
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

JS Ventures filed a timely appeal from the April 23, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 21, 2007. Claimant Toni Vezeau participated personally and was represented by Attorney Steve Rubes. Marcy Schneider of TALX UC eXpress represented the employer and presented testimony through Human Resources representative Barbara Howarter and Human Resources Director Stephanie Silva. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received employer's Exhibits One through Five into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection from the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Toni Vezeau was employed by Applebee's Neighborhood Grill from August 27, 2006 until March 27, 2007, when Human Resources Director Stephanie Silva discharged her. Ms. Vezeau's last day worked was February 1, 2007. On April 23, 2006, Ms. Vezeau had been injured in the course of the employment when her car was hit by a semi while she was traveling from one of the employer's restaurants to another. The matter was not treated as a worker's compensation claim during the period of employment. Ms. Vezeau was on an approved leave of absence from May 1, 2006 to June 1, 2006. On February 1, 2007, Ms. Vezeau commenced a second leave of absence so that she could undergo spinal surgery on February 2 and recover from the surgery. Ms. Vezeau had appropriate contact with her store manager prior to commencing the leave and maintained appropriate contact with the employer after commencing the leave. The spinal surgery was directly related to the injury that occurred on April 23, 2006. On March 27, 2007, Human Resources representative Barbara Howarter sent Ms. Vezeau a letter terminating the employment. Ms. Howarter indicated that the employer had received medical certification indicating that Ms. Vezeau would need to be off work for three months. Ms. Howarter indicated

that Ms. Vezeau had exceeded the allowable leave under the employer leave policy and that the employer deemed the employment relationship severed as of March 14, 2007.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on

which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes no misconduct on the part of Ms. Vezeau. Ms. Vezeau was discharged for no disqualifying reason. Accordingly, Ms. Vezeau is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Vezeau.

The administrative law judge would have reached the same outcome in this matter if the matter had been deemed an "other separation" under Workforce Development rule 871 IAC 24.1(113), because the only other basis for the separation, aside from exceeding the allowable leave period, was Ms. Vezeau's inability to meet the physical requirements of the employment.

DECISION:

The Agency representative's April 23, 2007, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs