

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ELIZABETH K DUNAHOO
Claimant

TMI EMPLOYEE MANAGMENT
Employer

APPEAL 18A-UI-10486-H2
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/23/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 11, 2018, (reference 01) that denied benefits. The parties were properly notified about the hearing. An in person hearing was held on November 8, 2018 in Dubuque, Iowa. Claimant participated. Employer did not participate.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant worked full time for the Marriott Hotel as a housekeeper at a Fairfield Marriott Hotel beginning in October 2017 through September 16, 2018, when she was discharged. The claimant has had three different stints of employment with the hotel, with her last on beginning in October 2017. During her entire period of employment she never received any disciplinary warnings either verbal or written.

The hotel was having a difficult time keeping housekeepers employed. The week prior to the incident six new housekeepers who had recently been hired all ended their employment. Also the week prior the long term general manager had ended her employment.

Crystal had been named as the executive housekeeper only two months before claimant's employment ended. Prior to her promotion Crystal and the claimant both were housekeepers and had a good relationship. Crystal would often give claimant a ride to and from work.

When the general manager was not present in the hotel the employee working at the front desk was in charge of all employees, including the newly appointed executive housekeeper, Crystal. On Sunday September 9, the claimant was working cleaning rooms and training a new housekeeper. The assignment list, or "board" the claimant had been given that morning listed all of the rooms she and her trainee were assigned to clean that day. By 11:00 a.m., she and her trainee had completed all the rooms on the 'board' that had been listed as "out" when she was given her list. As was the practice claimant contacted the front desk to find out if any of the

other rooms on her "board" had checked out so she could clean their rooms. Many guests do not and are not required to stop at the front desk in order to check out of the hotel. The only way the hotel will know if the guest has left the room is by knocking on the door and checking the room. After the claimant contacted the front desk to find out what to do, she was told to knock on the door of a particular room number to see if the guest had left so she and the trainee could continue working. Claimant knocked on the door, no one answered, she opened the door and discovered the guest had in fact left the room and checked out. She and her trainee began cleaning the room. The claimant followed the practice that had been in place for years. She had never been told that the practice had changed and she was not allowed to knock on room doors.

As they were cleaning, Crystal entered the room and began yelling at and berating the claimant for being in the room. The claimant tried to explain to her that she had followed the policy and contacted the front desk as she had run out of rooms to clean. When Crystal would not listen to her or stop yelling at her, the claimant left the room and went downstairs to the front desk. She spoke to Carolyn who was in charge as the general manager was going to be in until the afternoon. Claimant explained how embarrassed she was in front of the new trainee and how Crystal had humiliated and embarrassed her and would not let her explain. Carolyn instructed the claimant to take the rest of the day off and go home. Before the claimant left, Carolyn asked her where her "board" was and the claimant told her she had left it on her housekeeping cart. It was not against policy, rules or prior procedure to leave a 'board' on a housekeeping cart. The claimant was scheduled to be off work the following two days; Monday and Tuesday.

On Wednesday she called the hotel at 7:00 a.m. to find out if she was on the work schedule. Sherry was working the front desk and told the claimant not to come to work, but to come in and speak to Erin the acting general manager when she arrived at work at 3:00 p.m.

Claimant arrived at the hotel and spoke to Erin. Claimant told Erin what had happened on Sunday and Erin told her she would not be put back to work until Erin had a chance to speak to corporate human resources. Erin told the claimant that part of the problem was that claimant had left her board. Claimant told Carolyn where her board was and only left for the day when instructed to do so by Carolyn. The claimant knew that Erin was going on vacation for two weeks starting Friday so she expected to hear back from her very soon. When the claimant did not hear back from Erin on Thursday she called the hotel on Friday. She was told Erin had already left on vacation, but she was given Erin's cell phone number. Claimant sent Erin a text message asking when she would be allowed to return to work. Erin called her about five minutes later and told her that she had not heard back from corporate human resources, but she was discharging her because she had left her 'board' on September 9. The claimant only left work after being instructed by Carolyn to do so after Crystal berated her and yelled at her.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

The claimant did not quit her job; she was specifically told she was discharged by Erin on September 14. The claimant only left work on September 9 at Carolyn's instruction after being berated and yelled at by Crystal. The claimant never told anyone she was quitting and specifically told Erin that she was not quitting her job. The claimant's separation from employment is a discharge, not a voluntary quit.

Iowa Code section 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 disqualification shall continue 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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351

N.W.2d 806 (Iowa App. 1984). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The conduct for which claimant was discharged was not a violation of rules or procedure. She was told to leave work for the day by Carolyn who was in charge. The claimant did not abandon her employment or her "board" as she told Carolyn where he board was. The only reason that claimant even had to leave work that day was due to her treatment by Crystal, the executive housekeeper. The claimant had no prior warnings, verbal or written for any behavior or conduct. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The October 11, 2018, (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs