

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARSHALL RIDDLE

Claimant

APPEAL 19A-UI-04522-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OVATIONS FOOD SERVICES LP

Employer

OC: 05/05/19

Claimant: Respondent (1)

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

Iowa Code § 96.5(1) – Voluntary Quitting

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On June 3, 2019, Ovations Food Services, LP (employer) filed an appeal from the May 24, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Marshall Riddle (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on June 27, 2019. The claimant participated personally and his former co-worker, Valerie Stringer, participated on his behalf. The employer participated through Human Resource Manager Megan Sease and was represented by ADP Hearing Representative RoxAnne Rose. The hearing was observed by an Iowa Workforce Development representative for training purposes; while discussion was held about the appeals procedures after the hearing, this person had no input on the decision of the administrative law judge. The Employer's Exhibit 1 was admitted without objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a Banquet Server beginning on March 12, 2018, and was separated from employment on May 3, 2019, when he was discharged. The employer has a sexual harassment policy of which the claimant was aware. The employer operates its business out of an events facility. Posted on the entrances to the events facility is a policy forbidding weapons of any kind in the facility.

During the first week of April, the employer received a complaint of alleged sexual harassment by the claimant. It was reported that he told the employee that her "ass look[ed] good" and her "ass [was] making him crazy." (Sease Testimony) It was also reported that the claimant had

stared indiscriminately at one female customer's buttocks as she walked past. Human Resource Manager Megan Sease began an investigation and conducted environmental interviews with some but not all of the employees in the claimant's department. The claimant was not interviewed for the investigation and did not know there was an ongoing sexual harassment investigation.

On May 1, the claimant arrived to work with a case that contained a samurai sword which he had purchased for his supervisor at an estate sale. He walked up to the door of the facility where he worked and then thought better of taking the item into his workplace. The claimant took the case back to his vehicle and did not take it into the facility. Sease felt threatened and intimidated by the claimant's actions. The decision was made to discharge the claimant for the sexual harassment and bringing a weapon onto the premises of the facility where he worked.

The claimant denies he engaged in any sexual harassment. The claimant had not received any prior warnings related to violations of the sexual harassment policy or having a weapon on the facility premises. There was another employee who was found to have engaged in sexual harassment at work and he was allowed to continue working for the employer.

The administrative record reflects that the claimant has received unemployment benefits in the amount of \$1,708.00, since filing a claim with an effective date of May 5, 2019, for the seven weeks ending June 22, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

REASONING AND CONCLUSIONS OF LAW:

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

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 provides, in relevant part:

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.

...

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

This definition of misconduct 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).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the claimant's version of events. The employer did not provide any witnesses to the alleged sexual harassment and the witness who conducted the investigation into the allegations was not forthcoming with information regarding the issue. The claimant provided direct, first-hand testimony while the employer relied upon scant information from second-hand reports.

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, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *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). Misconduct serious enough to

warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Additionally, the employer is required to furnish evidence and details about the alleged misconduct. Without that information, the alleged misconduct cannot be disqualifying.

The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The claimant credibly testified he did not engage in any sexual harassment toward his co-workers. The employer failed to provide enough evidence to show the claimant engaged in disqualifying misconduct with regard to the allegations of sexual harassment.

The employer has established that the claimant brought a sword onto the premises of the facility where he worked. However, that action was merely an isolated incident of poor judgment on the claimant's part. He realized his error in judgement before bringing the sword into the workplace. There is no indication he engaged in any threatening conduct toward an employee with the sword. The claimant was carrying the sword in case and did not have it on display nor was in being brandished. The claimant had not received any warnings related to similar conduct.

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. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for attendance is not similar to violation of a policy related to weapons on the premises and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The May 24, 2019, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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