

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY S MUSGROVE
Claimant

APPEAL NO. 08A-UI-07308-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE HON COMPANY
Employer

**OC: 07/06/08 R: 04
Claimant: Appellant (2/R)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wendy S. Musgrove (claimant) appealed a representative's August 1, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with The Hon Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 26, 2008. The claimant participated in the hearing. Annette Lohse appeared on the employer's behalf and presented testimony from one other witness, Theren Wagner. During the hearing, Employer's Exhibits One through Four were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on July 11, 2005. She worked full time as a distribution support person in the employer's warehouse. Her last day of physical work was on or about December 29, 2007. After that date, the claimant was on a medical leave of absence until July 10, 2008. On July 10, the employer advised the claimant it was discharging her from her employment. The stated reason for the discharge was working elsewhere during her leave of absence.

When the claimant entered into her leave of absence, she accepted as a condition that she could not "work while on leave." In about mid-June, several employees of the employer observed the claimant behind the bar at a local establishment. The employer initiated an investigation as of July 1 and met with the claimant. The claimant denied she had been working at the bar. The employer obtained written statements from a number of employees who indicated they had seen the claimant behind the bar, and on July 10 determined to discharge the claimant.

The claimant had been employed as a bartender by the prior owner of the bar beginning in January of 2005. The ownership changed in December 2006, but ownership remained in the prior owner's family. The claimant asserted that she did not continue in her employment under the new ownership, but that she continued to visit the bar on occasion and remained friends with the new owner. The claimant acknowledged that on occasions when she visited the bar there were times that either the owner or the bartender on duty would request that she step behind the bar when they needed to step out briefly. However, the claimant denied that she was ever paid for doing so, which she viewed as doing them a favor. The employer asserted through hearsay testimony that the claimant was working a regular work schedule; the claimant denied this in her sworn testimony. The only first-hand testimony regarding the claimant's activity in the bar was that on June 18 Mr. Wagner was in the bar for between 10 and 15 minutes, and that during that time he was served a drink by another bartender while the claimant served a drink to another patron.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the allegation she had been working for another employer during her leave of absence. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact was working as an employee of the bar, as compared to occasionally stepping behind the bar as a favor to relieve or assist whomever was on duty for a brief time. Under the circumstances of this case, the claimant's conduct was

at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant is able and available for work as a consequence of information presented during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's August 1, 2008 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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