

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIANNA M BROWN

Claimant

APPEAL NO: 09A-UI-05538-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMUNITY TAP & PIZZA INC

Employer

OC: 03/08/09

Claimant: Respondent (1)

Section 96.5-2-a -Discharge

STATEMENT OF THE CASE:

Community Tap & Pizza, Inc. (employer) appealed a representative's April 2, 2009 decision (reference 01) that concluded Tianna M. Brown (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 4, 2009. The claimant participated in the hearing with her witnesses, Matthew Bradley, and Tina Brown. Denise Passow, a co-owner, Bonny Dinkloff, a cook, Jeff Hart, an assistant manager, Tiffany Baker and Nathan Passow appeared on the employer's behalf. During the hearing, Claimant Exhibit A was offered and admitted as 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in June 2008. The claimant worked as a part-time pizza maker.

During her employment, the claimant did not always work as scheduled. She was late and called in because she was sick, had personal problems or had issues with her boyfriend, Bradley. At various times Passow talked to the claimant about her attendance. The employer did not give the claimant a written warning for any attendance issues.

On March 9, the claimant was scheduled to work 11:00 a.m. to 1:00 p.m. and 4:00 to 9:00 p.m. The claimant called the employer between 10:00 and 10:50 a.m. The claimant told Passow she was unable to work that day because she had some issues. The claimant did not feel well and planned to see a doctor that day. Passow told the claimant she did not have to work her 11:00 a.m. to 1:00 p.m. shift, but the claimant needed to report at the 4:00 p.m. shift if she wanted her job.

Before the claimant called the employer on March 9, her mother saw her and told her she needed to see a doctor and call the employer. The claimant experienced a great deal of pain and had to constantly go to the bathroom. The claimant made a doctor's appointment that afternoon. Bradley took the claimant to the doctor's appointment.

The claimant did not report to work at 4:00 p.m. that day because she did not feel well and did not hear or listen when the employer told her to report at 4:00 p.m. or she would not have a job. On March 9 when the claimant did not call or report to work at 4:00 p.m., the employer took the claimant off the schedule and discharged her.

The next day, the claimant learned the employer had discharged her. After the claimant learned she was discharged for not reporting to work the day before, she called Passow on her cell phone and made some inappropriate and unnecessary comments.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if she voluntarily quits employment without good cause attributable to the employer, or an employer discharges her for reasons constituting work-connected misconduct. Iowa Code §§ 96.5-1, 2-a.

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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

This case revolves around a credibility issue. The Findings of Fact reflect the claimant's version of events. Base on the credible evidence, the claimant's testimony was found more credible than the employer's testimony. The employer testified that when Passow asked the claimant what issues she had on March 9, the claimant indicated boyfriend issues and said nothing about health problems. The claimant's testimony that she was ill and went to the doctor that day is credible. The doctor's statement dated March 27 states the claimant had a doctor's appointment on March 9. (Claimant Exhibit A.) If the employer wanted to dispute that the claimant went to a doctor on March 9, the employer had time to check this out before the hearing. While Passow asserted the claimant called in on March 6 stating she could not work

for the same medical problem, Hart, who allegedly took this call did not remember such a call. The claimant's mother also testified credibly that when she saw the claimant the morning of March 9, she told her to see a doctor and call the employer. A preponderance of the evidence establishes the claimant was ill, in pain and went to a doctor on March 9. Therefore, the employer's request that she report to work at 4:00 p.m. was not reasonable under these circumstances.

The credible evidence indicates Passow told the claimant she had to report to work at 4:00 p.m. The claimant, however, did not hear or was not listening to Passow when she was told she had to report at 4:00 p.m.

Understandably Passow was frustrated and upset when employees reported seeing the claimant in Bradley's car on March 9. The claimant had reasonable explanations for the times she was seen as a passenger.

Since the employer discharged the claimant on March 9, what the claimant said or did on March 10 cannot be considered because her March 10 actions were not the basis of the claimant's March 9 discharge.

Based on the credible evidence in this case, the employer discharged the claimant for compelling business reasons. The facts do not establish that the claimant intentionally failed to work as scheduled on March 9. Instead she was unable to work for health-related issues. The claimant did not commit a current act of work-connected misconduct. As of March 8, 2009, the claimant is qualified to receive benefits.

DECISION:

The representative's April 2, 2009 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of March 8, 2009, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css