IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NANCY V ALLBEE
Claimant

HERITAGE OF IOWA FALLS INC
Employer

APPEAL NO: 11A-UI-16271-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Heritage of Iowa Falls, Inc. (employer) appealed a representative's December 12, 2011 decision (reference 01) that concluded Nancy V. Allbee (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 23, 2012. The claimant participated in the hearing. Amelia Gallagher of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Diane Kline and Denise Dunkin. One other witness, Ellen Hinrichs, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One through Four were entered into evidence. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on May 18, 2009. She worked part time (15 hours per week) as a night cook in the employer's dietary department. Her last day of work was November 7, 2011. The employer discharged her on November 11, 2011. The reason asserted for the discharge was performance issues.

The most recent issue leading to the termination was a question as to whether the claimant had failed to serve a meal to the staff on the evening of November 4. One of the claimant's duties on Friday evenings was to serve a meal to the staff on duty. Walking tacos had been served to the day staff by the day cook, but when the claimant went to prepare walking tacos for the

evening staff, she did not find the meat in the refrigerator where she was told it would be. She then prepared more of the entrée being served to the residents that evening, and attempted to inform the charge nurse and the staff that they could eat from the regular serving line. The employer provided secondhand testimony that this information was not communicated to the staff. The claimant later found the taco meat in the freezer.

Also, shortly before the claimant's discharge, on October 31 the claimant had inquired about proper serving of hot dogs and potato chips, as to whether gloves and/or tongs were needed. The claimant then properly did serve the hot dogs holding the bun in a gloved hand and using a tongs for the meat, and had her assistant use a gloved hand to serve potato chips. However, the dietary manager, Dunkin, found this to be a performance failure because the claimant had asked the question when she should have already known the answer.

The employer faulted the claimant for shutting down the ice cream machine at 6:00 p.m. on September 24 rather than 7:00 p.m. However, the claimant had done so because they were out of mix. Also, on September 25, the employer faulted the claimant for closing the serving window at 5:30 p.m. rather than 6:00 p.m. This had been a change since June 1, 2011 to allow residents to get extra servings if desired; however, the claimant had not clearly understood the new schedule.

The employer had given the claimant a final written warning on September 2, 2011. This followed an issue regarding proper handling of food with ungloved hands on August 26. She had also forgotten to serve a resident on August 30, and had served a resident fish instead of the requested burger, when the resident's dietary requirements could have easily been satisfied by removing lettuce from the burger. The only warning prior to September was a warning on May 5, 2011 for failing to properly maintain a food temperature log.

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 that 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 that 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 her performance issues. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. Conduct asserted to be disqualifying misconduct must be both specific and current. *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988); *West v. Employment Appeal Board*, 489 N.W.2d 731 (Iowa 1992). None of the recent conduct asserted by the employer to be misconduct was intentional. Rather, at worst, the claimant's recent conduct was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or 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.

DECISION:

The representative's December 12, 2011 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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