

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA R SANDS

Claimant

APPEAL NO. 09A-UI-05958-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GLEN KARPINSKE

MCDONALD'S RESTAURANT

Employer

OC: 03/22/09

Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

McDonald's Restaurant (employer) appealed a representative's April 8, 2009 decision (reference 01) that concluded Barbara Sands (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 13, 2009. The claimant participated personally and through her husband, Jonathan Sands. The employer participated by John Leu, Operations Supervisor, and Lisa Kroeger, Store Manager. The claimant offered and Exhibit A was received into evidence. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 29, 2007, as a full-time swing manager. The claimant received the employer's handbook that consisted of two pieces of paper. The employer remembers giving the claimant warnings on January 18 and September 22, 2008, for inappropriate conduct. The claimant did not receive them and the warnings were unsigned. The employer did not notify the claimant that further infractions could result in termination from employment. The employer issued the claimant a good evaluation on July 15, 2008, with some suggestions for improvement.

On February 27, 2009, the restaurant was busy. It did \$1,000.00 business in one hour. The kitchen was busy and noisy. The claimant had to speak loudly to communicate with a new employee. At one point the new employee slammed something and walked toward the claimant. The claimant was fearful and spoke to her supervisor.

The employer investigated the incident by speaking to the supervisor. The supervisor said the claimant was yelling at the worker loudly enough for customers to hear. There were many

people working that day. The employer terminated the claimant on February 27, 2009, for harassing a coworker.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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.

871 IAC 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.

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony regarding the last incident but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye-witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's April 8, 2009 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css