IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHERRY L UPTON
Claimant

ABRH LLC
Employer

APPEAL NO. 17A-UI-06594-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/21/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Sherry Upton (claimant) appealed a representative's June 21, 2017, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with ABRH (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 17 2017. The claimant participated personally. The employer was represented by Amanda Lange, Hearings Representative, and participated by Timothy Wong, Regional Human Resources Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 May 20, 2003, as a full-time server at Village Inn. The claimant signed for receipt of the employer's handbook when she was hired. The employer did not issue the claimant any warnings during her employment.

The claimant sometimes worked with cooks who did not want to perform their duties. They sat on the counters and looked at their cellphones. They called the claimant names like big vagina, old lady, cunt, white trash, and monkey. The claimant complained to management about the cooks but nothing was done. She also complained about the general manager who threatened to shoot everyone in the restaurant. Unbeknownst to the claimant, the cooks filed an Equal Employment Opportunity Commission complaint against the employer in September 2016. The employer discovered the complaints allegations the week of May 8, 2017. The complaint said the claimant made racial slurs against the Hispanic cooks starting in April 2016.

On May 16, 2017, the employer came to the claimant's work location to tell her about the allegations. At first the claimant thought the employer was there because the cooks said, "Fuck you" and walked off the job. The employer told the claimant the cooks would not be fired because they had received no prior warnings. The claimant denied the allegations in the complaint and the employer suspended her. The employer investigated and some employees

said they heard the claimant make the racial slurs. On May 22, 2017, the employer terminated the claimant.

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, 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(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.

This definition 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).

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 but chose not to. 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 June 21, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs