

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEREK R HOLT
Claimant

BLACK SHEEP CR LLC
Employer

APPEAL 18A-UI-05116-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/01/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 26, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 21, 2018. The claimant participated and testified. The employer participated through Human Resource Representative Stephanie Mehmen and witnesses Chad Weber and Carly Okken. Employer's Exhibit 1 through 9 were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a server from April 7, 2016, until this employment ended on March 30, 2018, when he was discharged.

On March 27, 2018, two customers asked to speak to a manager. Weber, the front of the house manager, spoke to the customers. The customers told Weber there were a few things they wanted to bring to his attention regarding their server, the claimant. According to the customers, when they were asking about some of the menu items, claimant told them not to order an item because it was not good, that another item was a small portion for the price, and that they should order a steak medium so that it would be properly cooked to medium rare. (Exhibit 1). Prior to this claimant had several disciplinary actions related to the time it took him to greet his tables and the timeliness of his service. Additionally, Weber had spoken informally

with claimant once before about blaming the kitchen for being out of an item, when he should have known they were out of the item, as it was discussed in a staff meeting. Following the customers' report on March 27, the decision was made to end claimant's employment.

Claimant denied telling the customers a menu item was not good. Claimant testified the customers were trying to decide between two entrees. According to claimant, he told the customers the duck entrée was good, but was the smallest entrée, so if they were thinking about getting it he would recommend also getting a side of potatoes. Claimant denied mentioning anything about it being small for the price. Claimant further testified he told the customers the beef entrée was a very large cut of meat and was recommended to be served medium rare, but if they wanted it a little less pink, he would recommend ordering cooked to medium temperature. Claimant denied saying anything negative about the restaurant or any menu items. Claimant further testified that, while he had received prior warnings about his timely service, he was not aware that his job would be in jeopardy for his conduct on March 27.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 26, 2018. The claimant filed for and received a total of \$516.00 in unemployment insurance benefits for the weeks between April 1 and May 12, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on April 25, 2018. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Here, claimant was discharged after some customers told the manager he was speaking negatively about the menu items. Claimant provided credible testimony that he was simply trying to answer the customer's questions about the menu items honestly to assist them in making a decision and did not intend to disparage the employer in any way, though it is not clear that his comments did not come off that way to the customers. In that regard, no misconduct has been established. Furthermore, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

Here, claimant had received prior warnings regarding the timeliness of his service. To the extent that the circumstances surrounding this incident were not similar enough to those incidents to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The April 26, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs