

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BETH N SCHAUER

Claimant

APPEAL NO: 19A-UI-00849-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

JALAS ENTERPRISES INC

Employer

OC: 04/22/18

Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 28, 2019, reference 05, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 13, 2019. The claimant participated in the hearing. Jeremy Jalas, President/Owner, participated in the hearing on behalf of the employer. Employer's Exhibits One through Ten were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time shift lead for Jalas Enterprises (Subway) from June 18, 2018 to November 7, 2018. She was discharged for several violations of the employer's policy and accumulating five written warnings.

On August 10, 2018, the employer issued the claimant a written warning for being out of uniform because she was not wearing her hat and apron (Employer's Exhibit Four). The claimant agreed she was out of uniform and signed the warning without comment in the employee remarks box (Employer's Exhibit Four). On September 24, 2018, the claimant received a written warning for being 45 minutes late for the truck delivery September 13, 2018, and 56 minutes late for the truck delivery September 20, 2018 (Employer's Exhibit Five). She was scheduled to be at work at 6:00 a.m. both days and blames her tardiness on the fact the delivery driver did not call her. The claimant signed the warning without comment in the employee remarks box (Employer's Exhibit Five). Also on September 24, 2018, the claimant was issued a written warning for repeatedly failing to take the bank deposits to the bank on a daily basis, as required by the employer (Employer's Exhibit Six). The claimant signed the warning without comment in the employee remarks box (Employer's Exhibit Six). Additionally, on September 24, 2018, the claimant received a written warning for being 29 minutes late September 21, 2018, and then taking a break 20 minutes after she arrived (Employer's Exhibit Seven). The warning addressed the fact the claimant took four more breaks

that day (Employer's Exhibit Seven). The claimant signed the warning without comment in the employee remarks box (Employer's Exhibit Seven). On October 18, 2018, the employer issued the claimant a written warning after the Dr. Pepper representative complained she was "snippy and arguing/screaming at staff (Employer's Exhibit Eight). The employer and claimant agreed at that time the claimant should be removed from the assistant manager position and become a shift lead (Employer's Exhibit Eight). The claimant commented she had recommended that move prior to the date of the warning and signed the warning (Employer's Exhibit Eight). On November 7, 2018, the claimant received a written warning for using the wrong formulas on sandwiches November 6, 2018, by adding extra meat and telling employees to ring in each other's meals rather than ringing in their own under their identification number per the employer's policy (Employer's Exhibit Nine). The warning also addressed an incident on November 7, 2018, when the claimant was supposed to make two six foot submarine sandwiches and two vegetable trays in one hour and after 45 minutes had only completed one six foot sub sandwich (Employer's Exhibit Nine). Operations Director Eileen Sutton noted the claimant's "concern was getting a cigarette break" (Employer's Exhibit Nine). When she was told she could not have one at that time, the claimant wanted to know why and Ms. Sutton told her she had only been there two hours and she needed to start taking fewer cigarette breaks (Employer's Exhibit Nine). The employer determined that after five warnings, the claimant was not displaying the ability to prioritize tasks and had "poor time management" skills (Employer's Exhibit Nine). The employer terminated the claimant's employment November 7, 2018 (Employer's Exhibits Nine and Ten). The claimant refused to sign the warning (Employer's Exhibit Nine).

REASONING AND CONCLUSIONS OF LAW:

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

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 proving disqualifying misconduct. *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 substantial and 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).

The claimant accumulated five written warnings for work performance and attendance issues between August 10 and November 7, 2018. The claimant denies each incident or excuses her conduct and fails to take any responsibility for her actions. While the employer documented the claimant's actions in written warnings it did not provide the first-hand witness, Ms. Sutton, the author of the written warnings, to refute the claimant's denials and excuses. When 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). Without Ms. Sutton's testimony, the claimant's denials carry more weight than the employer's hearsay testimony. Consequently, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The January 28, 2019, reference 05, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn