IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TAWANA K MUHAMMAD Claimant **BORDER FOODS OF IOWA, LLC** Employer	**APPEAL 21A-UI-24172-DH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/19/21** **Claimant: Appellant (2)**

Iowa Code § 96.2(A) - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(8) - Current Act

STATEMENT OF THE CASE:

Claimant/appellant, Tawana Muhammad, appealed the October 19, 2021, (reference 02) unemployment insurance decision that denied unemployment insurance benefits due to a September 18, 2021 discharge for violation of a known company rule. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for December 27, 2021. Claimant participated. The employer, Border Foods of Iowa, LLC, participated through Brandon Wagner, restaurant general manger. Judicial notice was taken of the administrative file.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed full-time, with a varied schedule as an assistant general manager, and toward the end of her employment, as a shift leader. She started work in August 2014, with employer purchasing this Taco Bell in June, 2019, making claimant's first day with this employer (but a continuation with Taco Bell) June 12, 2019. Her last day worked was September 18, 2021 and it was also the day she was discharged for unsatisfactory performance of job duties and inappropriate behavior exhibited in violation of the rules set forth in the employer handbook.

Employer has a handbook, which claimant was provided access to an electronic copy while at work. Employer states the issues at hand are covered in the handbook. On September 18, 2021, claimant was discharged for violating company rules for an incident that happened on August 30, 2021. On August 30, 2021, the inside was open, but only for orders placed at the kiosk, otherwise orders had to be placed through the drive thru window. A customer had placed her order at the kiosk and was being served their food at the counter. Once she had been served her food, staff

at the counter resumed their duties, as they were not taking orders at the counter. Shortly thereafter, claimant noticed a male customer had come in and was standing at the counter, so she directed a co-worker to address the customer. The co-worker advised the customer that orders were not being taken at the counter and he had the option of ordering at the kiosk or going through the drive thru. The customer got mad, stating he had been standing there for twenty "fucking" minutes and you now tell me I have to order through the kiosk or the drive thru, why not just take my order. Being the shift leader, claimant stepped forward telling the customer to not talk that way and to either order using the kiosk or the drive thru. Claimant was not going to argue how long he was at the counter, but knew it was not more than a minute or two at most, due to just helping the prior customer. This incident stuck in claimant's mind as it was the prior customer's birthday and she had wished her a happy birthday. The male customer became enraged, utilizing the "f" word to state f you, f this and having a profanity tirade when claimant finally told the customer he needed to leave. The customer yelled at claimant, "Fuck you, Bitch!" and out of frustration, claimant threw a taco she was preparing at the customer.

Employer stated this type of behavior results in an automatic termination of employment, yet it took 19 additional days for the termination to happen. Tom, a general manager, as well as claimant reported the incident to Mr. Wagner on August 30, the date it occurred. Mr. Wagner reported it up his chain of command and approximately one week prior to September 18, 2021, Mr. Wagner's chain of command changed and he had to report it up the chain of command again, to learn that this would be an automatic termination as well, which then got scheduled for a few days later, on September 18, 2021.

There was no prior disciplinary action against claimant.

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:
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> 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.
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> 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.

Iowa Admin. Code r. 871-24.1 provides:

> Definitions.
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> Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.
>
> 24.1(113) *Separations.* All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> c. *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of

witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing and considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's side and recollection of those events. Employer's version was inconsistent and less credible when taken as a whole.

Employer testified there was a verbal written warning given to claimant over an inventory issue in sometime earlier in 2021, but Mr. Wagner had not information regarding when the incident was, the details of the incident or anything about the incident, including independent recollection of the incident, other than when pressed, testified he gave her a copy in the verbal written warning in the lobby of the restaurant. Claimant testified there was no such incident or verbal written warning. There was an incident about an inventory matter that was talked about was in a staff meeting involving all management. Employer had notice of the hearing and time to put together its evidence and provide exhibits of any discipline. No exhibits were offered and for whatever reason, employer did not have the asserted discipline available before him to testify regarding. With no prior discipline, there was no warning, and claimant's assertion she was not aware her job was in jeopardy is credible.

To the extent that the circumstances surrounding each accident were not similar enough 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). Ordinary negligence is all that is proven here.

Employer has failed to meet their burden of proof. The last act asserted was from August 30, 2021, but the termination was on September 18, 2021. If the act required automatic termination, as asserted by employer, the explanation provided as to why it took nineteen additional days to discharge claimant is not credible and therefore there is not good cause reason for taking so long from the date of incident to the date of discharge. If the act was not an automatic termination, the reason provided still does not excuse the time lag, resulting in no current act. This results in there being no current act from which claimant was discharged.

No current act was proven at or very near the date of separation to warrant employer discharging claimant. While the employer may have had good reasons to let claimant go, there was no disqualify reason proven and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The October 19, 2021, (reference 02) unemployment insurance decision denying benefits is **REVERSED**. Claimant was discharged from employment on for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Darrin T. Hamilton
Administrative Law Judge

January 25, 2022
Decision Dated and Mailed

dh/mh