

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BILLIE EAGAN
Claimant

APPEAL NO. 11A-UI-04685-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

FRONTIER MGMT CORP
Employer

OC: 03/06/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 30, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on May 26, 2011, in Davenport, Iowa. Claimant participated. Marsha Merry was a witness for the claimant. Employer participated by Kelly Kerkhoven, general manager; Cary Curtis, human resources; and Jodi Hamilton, rooms manager. The record consists of the testimony of Kelly Kerkhoven; the testimony of Jodi Hamilton; the testimony of Cary Curtis; the testimony of Billie Eagan; the testimony of Marsha Merry; Claimant's Exhibits A-H; and Employer's Exhibits 1-114.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a full service hotel located in Davenport, Iowa. The claimant was hired on August 6, 2009, as a full-time housekeeper. The claimant's last day of work was March 6, 2011. The claimant was terminated on March 9, 2011.

The incident that led to the claimant's termination occurred on March 6, 2011. The claimant and another employee, Marsha Merry, were on an authorized break. The claimant and Ms. Merry were having a private discussion about the claimant's daughter. The claimant told Ms. Merry that "payback's a bitch." She was referring to her daughter. Another employee named Renee heard the claimant's comment and thought it was about her. She reported the comment to the employer. Renee then told other employees that she got the claimant fired. The claimant heard about it and went to the employer. The claimant was informed that she was being terminated.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

There is no evidence of a current act of misconduct in this record. The claimant was having a private conversation with another employee, Marsha Merry, while both were on break. Another employee named Renee overheard a comment the claimant made concerning the claimant's daughter. Renee either assumed the comment was about her or reported the comment in an

effort to get the claimant terminated. Renee did not testify at the hearing. Marsha Merry did testify at the hearing and corroborated the claimant's testimony. Since there is no current act of misconduct, the claimant was not discharged for any disqualifying reason. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated March 30, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs