

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RACHEL L ANKLAM
Claimant

APPEAL NO. 16A-UI-11197-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 09/11/16
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 7, 2016, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant was discharged on September 15, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on November 1, 2016. Claimant Rachel Anklam participated. Edward Wright of ADP represented the employer and presented testimony through Scott Stegna, General Manager. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. Exhibits One through Six were received into evidence. Immediately after the hearing record closed, the administrative law judge realized he had not ruled on admission of Ms. Anklam's Exhibit A. The administrative law judge reopened the hearing record for the purpose of rule on the admissibility of Exhibit A. Once the employer's representative advised in writing that the employer did not object to Exhibit A, the administrative law judge received Exhibit A into evidence and reclosed the hearing record.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rachel Anklam was employed by Blazin Wings, Inc. as a full-time Hospitality Team Member from 2007 until September 15, 2016, when Scott Stegna, General Manager, discharged her from the employment.

The final incident that purportedly triggered the discharge occurred during Ms. Anklam's shift on September 14, 2016. During the shift, Mr. Anklam took a French fry from a cardboard bulk container of French fries container in the employer's food expediting or "expo" warming shelf. Ms. Anklam ate the French fry. Ms. Anklam was one of four employees who grazed from the

container at that moment. The “grazing” from the French fry container took place in full view of Amanda Grapp, Kitchen Manager. The employer established work rules prohibited grazing, unless specifically authorized by a manager. The written policy prohibited taking property belonging to the employer and failing to charge for food. At the time of the grazing incident, Ms. Grapp announced that there would be no eating out of the expo window or there would be a write up. Ms. Anklam apologized and, with the other offending parties, moved away from the French fry station. Ms. Anklam had not previously been counseled for grazing.

On the same day as the final incident, Ms. Anklam was one of a number of employees who were the target of a customer’s complaint of alleged rudeness. Ms. Anklam had only been tangentially involved in the matter, but later inserted herself into a discussion between Ms. Grapp and a coworker about the matter to the displeasure of Ms. Grapp. Ms. Grapp had another member of management have Ms. Anklam sign out and go home early for the day. The discharge occurred the following day.

In making the decision to discharge Ms. Anklam from the employment, the employer also purportedly considered an incident from September 10, 2016. Immediately after a morning staff meeting, Ms. Anklam stood outside the vicinity of the front of the restaurant and smoked a cigarette with coworkers. Ms. Anklam was off the clock at the time. Ms. Anklam was actually standing in front of a neighboring business, a few feet from the employer’s store. Ms. Anklam was in her work uniform that included insignia identifying the employer. Ms. Anklam had not previously been counseled for smoking in uniform or on the employer’s premises.

The only other conduct that purportedly factored into the discharge concerned attendance issues from on or before March 5, 2016.

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.

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record fails to establish misconduct in connection with the employment sufficiently substantial to disqualify Ms. Anklam for unemployment insurance benefits. The administrative law judge notes that the employer witness was not directly involved in the matters that factored in the discharge. The employer elected not to present testimony from people with personal knowledge of the matters that factored in the discharge. The employer had the ability to present such testimony. The weight of the evidence establishes a discharge ostensibly based on two minor incidents. One of those was an isolated and very minor incident of grazing. The other was an incident of smoking in uniform, while off-duty and outside the workplace. Neither incident separately or together rises to the level of disqualifying misconduct. The only other conduct that factored in the discharge concerned attendance issues remote in time from the discharge. The weight of the evidence supports Ms. Anklam's assertion that Ms. Anklam's

involvement in the customer complaint, and discussion of the customer's complaint, on the day before the discharge likely was a factor in the employer's decision to end the employment. The employer has presented no evidence to suggest misconduct in connection with that matter and the evidence does not establish misconduct in connection with that matter.

Because the evidence establishes a discharge for no disqualifying reason, Ms. Anklam is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 7, 2016, reference 01, decision is affirmed. The claimant was discharged on September 15, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs