

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL D FROIEN
Claimant

HARVEYS BR MANAGEMENT CO INC
Employer

APPEAL 16A-UI-02186-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/24/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the February 15, 2016 (reference 01) unemployment insurance decision that denied benefits based upon him being discharged for job related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on March 14, 2016. The claimant, Michael D. Froien, participated personally. The employer, Harveys Br Management Co, Inc., participated through Representative Michelle Hawkins; Human Resources Generalist Vicki Broussard; and Steakhouse Manager Charles Lime. Employer's Exhibits One and Two were admitted into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a server at the restaurant from July 23, 2014 until his employment ended on January 5, 2016.

The employer has several regulations, policies, and procedures in place for its employees. Claimant signed that he had received a copy of the employee handbook (Employer's Exhibit Two). The employee handbook included company conduct standard #12: "Team members will use professional judgment and will refrain from acts of gross misjudgment, carelessness, negligence in the performance of one's job, or any serious conduct detrimental to the orderly and ethical operation of the business." As well as company conduct standard #1: "Team members will demonstrate courtesy, friendliness, and appropriate greetings; and professional language, tone, manner, and interaction with guests; using an upbeat and positive attitude."

Claimant had received verbal and written warnings on numerous occasions regarding his conduct at work. His first written warning occurred from an incident on April 22, 2015; when he yelled using obscene language in front of and indirectly toward a co-worker. This was done in an area that the employer's clients could have heard it (Employer's Exhibit One).

His second written warning occurred from an incident on July 18, 2015 when he left a flambé cart on two separate occasions in front of guests when it was cooking and the flame was still on. This was a safety hazard and he did not follow the cook's instructions to complete cooking the desert without interruption.

His third written warning occurred from an incident on October 26, 2015; when he tossed his notepad onto a table and told the guests to write down what they wanted charged on each of their credit cards. This occurred because the guests wanted separate bills instead of one bill. When his supervisor Mr. Briggs approached the claimant to discuss his actions in doing this, claimant waived Ms. Briggs off and walked away.

On December 31, 2015, claimant was a server at a VIP event for the casino guests. These guests were told that they did not have to pay for this dinner. This was the third or fourth dinner that was held in the restaurant where VIP guests were invited and they did not have to pay. No other servers presented bills to the guests during this dinner. During this evening, claimant created a bill for the guests he was serving and presented the bills to the guests for payment. Another co-worker, Maria Negrete, who was eating with the guests observed claimant mention that gratuity was appreciated. A guest reported to Ms. Negrete that it made them feel uncomfortable when claimant asked for gratuity. Following this incident, the claimant was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from employment was a discharge for job-related misconduct. Benefits are denied.

It is my duty, as the administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). I assessed the credibility of the witnesses who testified during the hearing and considering the applicable factors listed above, and using my own common sense and experience, I find the employer's version of events to be more credible than the claimant's recollection of those events.

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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

This case does not involve poor work performance but the claimant's repeated negligence in failing to abide by the employer's policies regarding employee conduct. Claimant contended that he was given written warnings because Mr. Lime was his new supervisor and there was a personality conflict between the two of them. However, Mr. Lime was not even working on the days that two of the four incidents occurred.

Claimant knew what was expected of him as an employee and not to act in an unprofessional manner. He was aware of this after his first written warning in April 2015; when he used obscene language towards another co-worker and within earshot of customers. Further, claimant had an opportunity on each occasion where he received a written warning to write any comments or disagreements he had with the facts that the written warnings were based upon and he did not do so.

The employer has presented substantial and credible evidence that claimant was acting against the best interests of the employer. These incidents amount to disqualifying job misconduct. As such, benefits must be denied.

DECISION:

The February 15, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/can