

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSU MASSAQUOI

Claimant

APPEAL NO: 14A-UI-03259-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABSOLUTE FLAVORS LLC

SMOKEY D'S BBQ

Employer

OC: 02/23/14

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Absolute Flavors, L.L.C. / Smokey D's BBQ (employer) appealed a representative's March 17, 2014 decision (reference 01) that concluded Jusu Massaquoi (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on April 21, 2014. The claimant participated in the hearing. Sherry Warth appeared on the employer's behalf and presented testimony from one other witness, Jeffrey Wilkerson. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on January 15, 2013. He worked full time as a dishwasher at the employer's restaurant. His last day of work was February 25, 2014. The employer discharged him on that date. The reason asserted for the discharge was being late for a mandatory meeting on February 23 and being held responsible for dishes that were put away dirty on the claimant's shift on the evening of February 22, after having received prior warnings on other issues.

There was a mandatory kitchen meeting set for 9:00 a.m. on Sunday, February 23. The claimant only lived about ten minutes away from the work site, but when he went to his car to leave to report for the meeting, his car would not start. He ultimately was able to contact an

acquaintance who came and picked him up and took him to work, but he did not arrive until 9:32 a.m.

The claimant had been on duty on the evening of February 22, as had been another, more newly hired dishwasher. On the morning of February 23 the operations manager, Wilkerson, found that there had been some cooking utensils which had been put away the prior evening that were not properly cleaned. He held both the claimant and the other dishwasher responsible, as he did not know which one of them had actually put the dishes away dirty. The claimant denied that he had put away any of the dishes that were dirty, and indicted that he had caught the other dishwasher doing so on some occasions, but that he did not have an opportunity to check all of the dishes that the other dishwasher put away.

The claimant had previously been given written warnings on April 6, 2013, August 26, 2013, and February 12, 2014. The April 6 warning also dealt with dishes being put away dirty and was also a situation where both dishwashers on duty, the claimant and another dishwasher, were held responsible. The August 26 warning dealt with use of the claimant's cell phone while on duty as well as arguing with the employer. The warning on February 12 was again an issue of using his cell phone while on duty; that warning indicated: "Jusu was failing to follow company policies, he was caught on his phone on the clock. Next time this will be a termination."

The claimant reasonably understood the February 12 warning as indicating that if there were any further violations of using his cell phone on the clock, he would be discharged. The employer, however, interpreted this February 12 warning as a final warning for any policy violation. As a result, with the additional dirty dish issue from the evening of February 22, together with being late for the mandatory meeting on February 23, the employer determined to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his being on duty during the shift for which dirty dishes were found the next day as well as being late for a mandatory meeting on February 23, after the prior warnings. Misconduct connotes volition. *Huntoon*, supra. In order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant did not have any prior warnings for punctuality, and he reasonably understood his February 12 warning to be a final warning for cell phone usage. While the claimant had previously been warned about dirty dishes, the employer has not established that the claimant was personally responsible for the dishes that were put away dirty on February 22, and a finding of misconduct cannot be based on a determination that the claimant was equally responsible for conduct committed by another person of which he was not aware. While the employer may have had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 17, 2014 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css