

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TERI A ANDERSON**  
Claimant

**J&D RESTAURANTS INC**  
Employer

**APPEAL 19A-UI-00929-SC**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/13/19  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

J&D Restaurants, Inc. (employer) filed an appeal from the January 31, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Teri A. Anderson (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A hearing was held in Des Moines, Iowa at 11:00 a.m. on February 15, 2019. The claimant participated personally. Latoshia M. Robbins, the claimant's daughter, observed the hearing but did not participate. The employer participated through Human Resources Director Mike Ruch. The Claimant's Exhibit A and the Employer's Exhibits 1 and 2 were admitted without objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?  
Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a General Manager beginning on January 1, 2016, and was separated from employment on January 14, 2019, when she was discharged. The employer has a policy against smoking or vaping in the restaurant.

On January 11, 2019, Human Resources Director Mike Ruch received information from Department Manager Cindy Hobbs that she had observed the claimant vaping in the restaurant at least 75 times. Ruch took Hobbs' statement and that of another employee with whom the claimant rarely worked stating he had seen the claimant vape in the restaurant. After speaking with Supervisor Brian Douglas and reviewing the policies, they made the decision to end the claimant's employment.

On January 14, 2019, Ruch notified the claimant she was being discharged. The claimant denied vaping in the restaurant. She was a smoker and familiar with the employer's policy as well as the approved smoking locations. She used a vapor pen for approximately three weeks in an attempt to quit smoking, but only vaped in the approved areas. The claimant had previously been directed by Douglas to watch Hobbs as she was being investigated by the corporate office for reporting to work intoxicated and Hobbs may have been aware the claimant was watching her. The claimant had not received any prior warnings related to vaping in the restaurant.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,983.00, since filing a claim with an effective date of January 13, 2019, for the four weeks ending February 9, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made. As the claimant presented direct, first-hand testimony while the employer relied upon hearsay statements, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The claimant denies engaging in the conduct. The employer has not presented sufficient evidence to refute the claimant's denial. As a result, the employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

**DECISION:**

The January 31, 2019, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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