IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

EMMA E BEBERMEYER Claimant **R C CASINO LLC** Employer	**APPEAL 18A-UI-08644-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/29/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 13, 2018, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for conduct not in the best interest of the employer. The parties were properly notified about the hearing. A telephone hearing was held on September 5, 2018. Claimant participated and testified. Employer participated through Human Resource Business Partner Sara Pasha. Employer's Exhibits 1 through 7 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on April 4, 2018. Claimant last worked as a part-time spa receptionist. Claimant was separated from employment on July 29, 2018, when she was discharged.

On July 28, 2018, claimant was working with spa customers who were part of a bridal party. The bridal party was completing a scavenger hunt and asked claimant to do a champagne toast with the bride as part of their game. Another employee, Angie Carter, reported seeing claimant take a sip from a glass that was half full of champagne. (Exhibit 1). Possessing or consuming alcohol in the workplace violates the employer's policies, which claimant received a copy of upon her hire. (Exhibits 5 and 7). Carter reported what she had seen to Spa Manager Doree Henderson. Henderson then asked claimant to come back to the office, where she informed her of what was reported and that she would be sent home pending an investigation. Security Shift Supervisor Lisa Brewer was also present for this conversation. According to statements by Henderson and Brewer, claimant admitted to taking a drink of the champagne, but insisted it was only a sip. (Exhibits 2 and 3). Claimant was subsequently discharged for violating the employer's policy on alcohol in the workplace. (Exhibit 4).

At the time of the hearing claimant admitted to taking a sip from the champagne glass, but testified the glass contained orange juice, not champagne. Claimant testified she explained this to Henderson when they spoke on July 28, but that no one would listen to her. Claimant further testified she did not believe she had done anything that day that would result in her being discharged from employment. Claimant had no prior warnings or disciplinary action.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Here, there is a dispute between the parties as to whether the glass claimant drank from contained champagne or orange juice. Even assuming the evidence most favorable to the employer is correct, the conduct for which claimant was discharged was merely an isolated incident of poor judgment. Drinking on the job, even a small sip, is most certainly not advisable, however, given the context of the events surrounding this incident, claimant's testimony that she did not believe her actions would put her job is jeopardy is credible. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The August 13, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/rvs