IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTINA M PARK
Claimant

COUNTRY KITCHEN
Employer

APPEAL NO. 07O-UI-09406-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07-01-07 R: 01
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 3, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 29, 2007 in front of Administrative Law Judge Lewis. The claimant did participate. The employer did not participate. The employer appealed the decision to the Employment Appeal Board who remanded for a new hearing. After due notice was issued, a hearing was held on October 22, 2007. The claimant did participate. The employer did participate through Chanh Lo, Owner.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as an assistant manager full time beginning June 14, 2007 through July 3, 2007 when she was discharged.

The claimant began working for the restaurant on July 29, 2002 as a server, then she was promoted to a shift supervisor and then to assistant manager. The store was sold and new owners took over on June 14, 2007.

The claimant called in sick to work on Sunday and was then told by the employer that she had to work because he had plans for the evening. The claimant reported for work and was performing her normal job duties. The employer alleges that the claimant was giving him "attitude" yet he was unable to articulate anything the claimant said that could explain or amplify his description of the claimant's "attitude." The employer alleged that the claimant was giving him a "mean face." The claimant admits that she did not feel well, but because the employer had demanded she work, she had come in and was performing her normal job duties. The claimant alleges that in her two weeks of employment for the new employers, she taught them all she knew about the business and when they determined that her salary was too large, she was discharged.

The claimant had previously gotten into an argument with the dishwasher who would not perform the tasks she assigned to him. The claimant properly notified the owners about the situation. The claimant was told that the next time she needed to have a discussion with the dishwasher or any other employee she was to take them into the office to insure that customers would not overhear the discussion.

The employer alleges that the claimant was calling him an asshole, but the claimant denies such conduct. The claimant did not know her job was in jeopardy.

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 § 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The administrative law judge is not persuaded that the claimant used any profanity in speaking to anyone including Mr. Lo. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. The employer's allegation that the claimant had a poor attitude and a mean face that evidence her desire not to help in the business does not amount to misconduct. The claimant did not feel well on her last day of work and had tried to call in sick when the employer demanded that she report for work. Naturally the claimant may have not appeared at her best, but the administrative law judge is not persuaded that she deliberately acted to hurt the business in any way. Since no misconduct has been established benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The August 3, 2007, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/css