IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMANDA C RAWLINGS Claimant **COMES INVESTMENTS INC** Employer	**APPEAL 18R-UI-05091-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/11/18** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 5, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on May 18, 2018. Claimant participated personally and through witness Elizabeth Olson. Employer participated through payroll/human resource manager Jill Comes, area coach Kyle Monson, area coach Leann Lyman, and owner Joe Comes. Walter Githens observed. Claimant's Exhibits A and B were received. Employer's Exhibits 1 through 4 were received.

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 September 28, 2015. Claimant last worked as a full-time restaurant general manager. Claimant was separated from employment on February 16, 2018, when she was terminated.

On August 8, 2017, claimant was promoted from shift leader to restaurant general manager.

On September 28, 2017, the restaurant claimant managed failed an inspection by the Iowa Department of Health. Claimant was given a verbal warning for the failed inspection.

In October 2017, employer felt claimant was asking it to falsify documents in support of her application for public assistance. Employer did not discipline claimant because of the incident.

In November 2017, employer gave claimant a verbal warning about using the specified amount of ingredients, ringing in items, and keeping accurate inventory.

On November 9, 2017, employer received a customer complaint about the service claimant provided. Employer did not discipline claimant because of the incident.

On December 27, 2017, a customer complained about the service and food at the restaurant claimant managed. Employer did not discipline claimant because of the incident.

On January 5, 2018, area coach Kyle Monson asked claimant to take and pass the serve safe test. On January 8, 2018, Monson reminded claimant again. Claimant stated she was too busy in her work and personal life at that time. Claimant logged in and started to complete the task on January 16, 2018. Claimant was never given a deadline to complete the task and did not complete the task prior to her termination.

On January 6, 2018, two shift leaders were working when one shift leader walked out. The remaining shift leader called claimant, but could not reach her. The remaining shift leader also resigned. However, when claimant spoke to both employees she was able to rectify the situation and both employees returned to their employment. Employer never disciplined claimant for the incident.

On January 30, 2018, a customer complained about the service and food at the restaurant claimant managed. Employer did not discipline claimant because of the incident.

On February 4, 2018, the mother of a 16-year old employee complained about claimant. On February 3, 2018, the young employee was working at the "make table" and claimant ordered food as a paying customer. Claimant's order was delivered incomplete. Claimant called the restaurant and spoke to another employee, Lauren, and stated she needed to get the young employee off the "fucking make table." The young employee was offended because he is not the person who made the order. Employer never notified claimant or disciplined claimant about the incident.

Employer terminated claimant's employment on February 16, 2018, because she was not meeting the standards of the franchise.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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 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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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).

In this case, employer terminated claimant because it did not like the way she was running the restaurant. Employer was receiving employee and customer complaints and claimant was not showing initiative in completing the serve safe test. However, employer did not bring its displeasure with claimant to her attention and give her an opportunity to fix the issues. Employer gave claimant only two verbal warnings during her employment, and those were for a failed health inspection and issues with inventory control. Those were not the issues for which she was later terminated. If employer was unhappy with claimant, it should have disciplined her and given her deadlines by which to correct the issues. Inasmuch as employer had not previously warned claimant about the issues 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. 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.

DECISION:

The March 5, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

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