

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GABRIELLE S FORMANEK
Claimant

DRM INC
Employer

APPEAL 19A-UI-09873-S1-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/03/19
Claimant: Respondent (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment
871 IAC 24.10 – Employer Participation in the Fact-Finding Interview

STATEMENT OF THE CASE:

DRM (employer) appealed a representative's December 6, 2019, decision (reference 02) that concluded Gabrielle Formanek (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 17, 2020. The claimant did not provide a telephone number where she could be reached and, therefore, did not participate. The employer was represented by Thomas Kuiper, Hearings Representative, and participated by Scott Smith, District Manager. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 25, 2019, and at the end of her employment she was working as a full-time shift manager. She signed for receipt of the employer's handbook on March 22, 2019. The handbook has a policy which prevents supervisors from having personal relationships with subordinates. The handbook also states that one day of absence without reporting is deemed a voluntary quit. The employer did not issue the claimant any warnings during her employment.

The claimant's direct supervisor was the assistant manager and her supervisor was the general manager. The general manager and the claimant were involved in a flirtation. On November 1, 2019, the claimant and general manager engaged in a discussion during work hours about their personal involvement. The general manager took the claimant outside the restaurant so that others could not hear the loud conversation. During the conversation the general manager terminated the claimant.

The general manager told the employer that he sent the claimant home but only for the rest of the day. He recorded the claimant's absences on November 2 and 3, 2019, as no-call/no-shows. On November 4, 2019, the claimant returned her uniforms and keys to the employer. When the district manager heard there was an argument, he questioned the general manager. The general manager admitted to being involved in a flirtation with the claimant. He said that when he tried to stop the relationship, the claimant was upset and he sent her home. The district manager planned to contact the claimant but did not. The district manager issued the general manager a disciplinary action but he still works for the company.

The claimant filed for unemployment insurance benefits with an effective date of November 3, 2019. The employer participated personally at the fact finding interview on December 4, 2019, by Scott Smith. Mr. Smith did not have firsthand knowledge of the events leading to the separation. The claimant told the fact-finder, "He was screaming at me and then he said you're fired. He was mad because I wanted to stop flirting and he got mad and yelled at me and then screamed at me because I was fired."

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The employer had the power to present testimony from an eyewitness but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of what occurred on November 1, 2019. The only information from an eyewitness is the statement the claimant gave to the fact-finder. The claimant implies in her statement to the fact-finder that she could continue to work for the employer so long as she continued to flirt with the general manager. On November 1, 2019, the two had a discussion about ending the flirtation. The claimant was terminated when she refused to continue that type of relationship. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's December 6, 2019, decision (reference 02) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn