

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KELLY A WINGER
Claimant

KINSETH HOTEL CORPORATION
Employer

APPEAL 17A-UI-04728-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/19/16
Claimant: Appellant (2)

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

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 24, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 22, 2017. The claimant participated personally. The employer did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. However, Ms. Winger had listed Ryan Dix, food and beverage manager, to appear on her behalf at the hearing. When Mr. Dix was called, he was provided the option to attend (as the claimant's witness or employer representative.) He declined, stating he was unsure if he had permission from his company.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed part-time as a sales coordinator and part-time as a server. She was separated from employment on March 24, 2017, when she was discharged.

The claimant was aware of the employer's attendance policy which requires an employee call off three hours before a scheduled shift. The claimant also stated the employer would give three warnings before discharge for attendance. The claimant worked Monday through Friday as a sales coordinator, from 9:00 a.m. until 1:00 p.m. She would then coordinate with manager, Ryan Dix, to work additional shifts as a server.

The undisputed evidence is the claimant was issued a written warning for attendance after the claimant missed work due to a sick child. The claimant was then issued a second warning in response to a March 5, 2017 incident in which she overslept and called in late. The claimant performed work on March 18, 2017 as a server and was given permission by Mr. Dix to not work her scheduled shift on March 19, 2017. The claimant then overslept again on March 20, 2017, and called her employer at 11:00 a.m., after her 9:00 a.m. start time. The claimant had been up all night with her sick infant son. The claimant returned to work on March 21, 2017, and was told she was being suspended based upon being a no call/no show on March 19, 2017 (which the claimant denied) and her late call in on March 20, 2017. The employer did not tell the claimant that she was facing additional discipline pending review, but only that the suspension was the disciplinary response to the March 19 and 20 incidents. The claimant was absent on March 23, 2017 due to a medical appointment which she properly reported. When the claimant returned to work on March 24, 2017, she was discharged based on the March 19 and 20 incidents.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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 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.” *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness’s appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness’s interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the claimant was aware of the employer’s policies, which require properly notifying the employer of an absence before a start time. The claimant had been issued written warnings in November 2016 and again March 5, 2017 for attendance infractions, and then the claimant was issued a disciplinary suspension in response to an alleged incident on March 19, 2017 and a late call off on March 20, 2017. The claimant credibly testified she had received permission from Mr. Dix to be absent on March 19, 2017, and therefore should not have been disciplined for the issue. With respect to the March 20, 2017 late call off, the administrative law judge is persuaded a warning or discipline was warranted, in light of the claimant oversleeping after being up with a sick child. However, the claimant was issued discipline for the two incidents on March 21, 2017 when she returned to the office by way of the two day disciplinary suspension.

The employer did not attend the hearing or submit any documentation to the Appeals Bureau to be used in lieu of attending the May 22, 2017 hearing. The employer therefore was unable to refute the evidence presented by the claimant. The credible evidence presented is that the

claimant was not told she was subject to additional discipline for the final two incidents and when she returned to work on March 24, 2017, she was fired based upon the March 19 and 20, 2017 incidents, for which she had already been warned/suspended.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Inasmuch as the employer had warned the claimant about the final incident on March 21, 2017 (by way of suspension) and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that the claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The April 24, 2017, (reference 08) decision is REVERSED. The claimant was discharged for no disqualifying reason. Benefits are allowed provided the claimant is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn