

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MEGAN R BLAINE
Claimant

COURTSIDE BAR & GRILL INC
Employer

APPEAL 15A-UI-03643-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/01/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 19, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the separation. The parties were properly notified about the hearing. A telephone hearing was held on April 28, 2015. The claimant participated. The employer participated through Steve Palen.

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 bartender and was separated from employment on March 1, 2015, when she was discharged.

The final incident occurred on February 27, 2015, around 2:00 a.m. after the employer's bar had closed. The claimant was visiting as a guest, and had been consuming alcohol. While talking to her friend at the bar, she was confronted by another bartender named Anne, who told the claimant to quit talking about her. A verbal confrontation ensued with both parties yelling and calling each other a "slut." The claimant called her husband to pick her up and went outside to smoke a cigarette. When going outside, the claimant told Anne she was going outside for her cigarette and would be out there if Anne wanted to talk. Anne did not come outside, and the claimant was subsequently discharged for verbally assaulting a peer while off duty and visiting the employer's location.

The claimant had no prior written warnings that were considered in the decision to discharge her. The employer did not present a policy that applied to the claimant's off-duty conduct or that contained language about off-duty conduct or governing one's self while on the premises.

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.

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 the 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.

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.

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 did not present an applicable policy to the claimant's actions on February 27, 2015, and defined her conduct as "verbal assault." The employer did not put the claimant on reasonable notice that any actions while off duty may affect her job status. In addition, without prior warnings or even notice of applicable policies, the claimant had no real or reasonable way to know she could lose her job for a single verbal argument involving a co-worker, while visiting the premises and consuming alcoholic beverages.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The two people with any direct knowledge of the situation, other than claimant, were Anne and Misty and were not listed as witnesses. No request to continue the hearing was made and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's complete reliance on hearsay statements is unsettling. Nor did the employer bother to submit a copy of the policy at issue. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The claimant engaged in a verbal argument with another employee while visiting the employer, off duty. The claimant neither threatened nor threw an object at Anne, and prior to March 1, 2015, the claimant had no way to reasonably anticipate she could lose her job for an off-duty argument, either through prior disciplinary action or through a written employer policy or rule. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

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. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The March 19, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/css