

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIARA JOHNSON
Claimant

DIAL SILVERCREST CORP
Employer

APPEAL 21A-UI-06768-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/27/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 23, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged based on she violated a known rule. The parties were properly notified of the hearing. A telephone hearing was held on May 11, 2021. The claimant participated. Robert Johnson and Ronda Branson provided testimony in support of the claimant. The employer did not participate. The administrative law judge took official notice of the agency records. Exhibit A was admitted into the record.

ISSUE:

Whether the claimant's separation from employment disqualifies her from benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a dietary server from February 19, 2014, until this employment ended on December 3, 2020, when she was discharged. The claimant's immediate supervisor was Chef Mirsad (last name unknown).

The employer has a harassment policy which prohibits harassment. The claimant was not sure if the term harassment is defined in the policy. Employees did not receive training on the harassment policy.

The claimant was friends with two coworkers, Hilary Smith and Aaron Newton. As part of their friendship, the three would hang out outside of work. The claimant noticed that Mr. Newton inappropriately touched Ms. Smith on several occasions, even after she told him that she did not want to be touched there. The claimant told Mr. Newton to stop touching Ms. Smith in that way. The claimant realized she was not being taken seriously, so she reported this concern to Ms. Smith's mother, Ronda Branson. Neither the claimant nor Ms. Branson remembered exactly

when this conversation took place. Ms. Branson guessed the conversation occurred around Thanksgiving Day.

Shortly after the claimant informed Ms. Branson of this behavior, Mr. Newton started discussing these events at work. The claimant denied discussing these concerns at work.

On December 3, 2020, Director Stacy Furland informed the claimant she was being terminated for violating the employer's harassment policy. Ms. Furland did not explain how the claimant violated the employer's harassment policy.

The claimant provided a statement written by Hilary Smith. (Exhibit A) Ms. Smith states the claimant was terminated for telling the truth regarding Mr. Newton's behavior.

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 section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *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). 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).

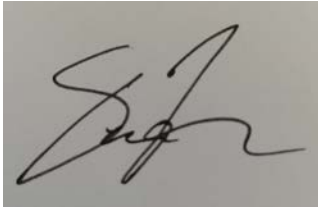
In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. *See also, Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), (quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982)); 76 Am. Jur. 2d, Unemployment Compensation §§ 77-78.

The misconduct the claimant is being punished for occurred outside of the scope of her duties and outside of the workplace. In that context, the employer must show it can meet all the elements outlined above and cannot do so. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). The employer did not participate in the hearing, but it would be difficult to establish that the claimant's behavior meets any of these elements even if it had. The claimant's behavior does not appear to have any nexus to her dietary server role. The administrative law judge does not intend to diminish the claimant's work, but she was far from being a public face for the company. Furthermore, the claimant's concern regarding Mr. Newton's touching of Ms. Smith is aligned with the employer's interest in preventing the very thing she was accused of doing. Although Mr. Newton's behavior was seen primarily outside of the workplace, Ms. Smith being touched inappropriately by Mr. Newton could spill over into the workplace given they both work for the employer. The employer also cannot show the claimant's concern regarding Mr. Newton's behavior violated the harassment policy or other policies. The claimant did what she did without the knowledge or intent to harm the employer's interest. Quite the opposite, the claimant appears to have acted in good faith to resolve inappropriate behavior between her two coworkers. Benefits are granted.

DECISION:

The February 23, 2021, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'S. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

May 19, 2021
Decision Dated and Mailed

smn/scn