

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DIANE S GRILLO
Claimant

WESLEYLIFE
Employer

APPEAL 19A-UI-05908-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/23/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant/appellant, Diane S. Grillo, filed an appeal to the July 24, 2019 (reference 02) initial decision that denied benefits based upon separation with this employer. After proper notice, a telephone hearing was conducted on August 16, 2019. The hearing was held jointly with Appeal 19A-UI-05909-JC-T.

The claimant participated personally. Prior to the hearing, the employer requested a postponement, which was denied as untimely. At the time of the hearing, Hope Summers, hearing representative with Talx, registered to participate in the hearing with employer witness, Terry Boston. Mr. Boston was not available when called for the hearing and did not respond to a voicemail directing him to call the Appeals Bureau. Ms. Summers elected not to attend without an employer witness. 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 began work in September 2016 and worked as a full-time food and beverage associate until June 25, 2019 when she was discharged.

When the claimant was hired, she was trained on employer rules and procedures. In addition, prior to the final incident, the claimant had been issued two warnings for conflict with employees, which she disputed.

A week prior to the final incident, the claimant had raised concern to management about the chef and available food. This apparently upset the chef, who saw the claimant while she was working the dinner shift on June 20, 2019. This was not her usual shift; she was working an

extra shift due to a staff shortage. The claimant was standing near the hot food when the chef approached her with the cold food. The claimant believed he was mad about her reporting of him. He slammed the food down next to her and approached her personal space, yelling at her and calling her a “fucking bitch” while pointing his finger in her face. The claimant admitted to feeling intimidated by him and yelled back at him, “Get out of my face” and “back up”. The confrontation occurred in the kitchen and outside the presence of residents, who were not in the dining hall yet and attending a concert. A member of management in a nearby office heard the claimant yell and she was subsequently discharged because she had been previously warned. The chef remained employed.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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 of proof in establishing disqualifying job related 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 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. 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 claimant 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.

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.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). In this case, the undisputed evidence is the claimant had two prior warnings after conflict, before the final incident on June 20, 2019. The claimant knew or should have known that future conflict could lead to additional discipline, including discharge.

The final incident here occurred on June 20, 2019, when a male co-worker initiated conflict with the claimant. He approached her work space, yelled profanities at her, calling her names, and pointed his finger in her face. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The administrative law judge recognizes that yelling in a work setting such as the claimant's would generally be contrary to the best interest of the employer. In this case, however, the claimant was being confronted by a male co-worker who had violated her personal space and engaging in aggressive behavior and yelling profanity at her. The administrative law judge does not condone yelling in the workplace but concludes that in this case, it was a reasonable response under the circumstances. The claimant's conduct did not include profanity and was not in the

presence of residents. Based upon these circumstances, the administrative law judge concludes that the claimant has established mitigating circumstances for her response of yelling back at the chef on June 20, 2019. The employer has failed to establish by a preponderance of the evidence that the claimant engaged in a final act of misconduct. Accordingly, benefits are allowed, provided she is otherwise eligible.

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 July 24, 2019, (reference 02) 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. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn