**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **SEANTEELLE M SMITH**<br>Claimant<br><br>**MIRACLE MUSCATINE INC**<br>Employer | **APPEAL 18R-UI-06549-DL-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 03/11/18**<br>**Claimant: Respondent (1R)** |

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the April 11, 2018, (reference 01), unemployment insurance decision that allowed benefits based upon a discharge from employment. After due notice was issued, a telephone conference hearing was held on July 2, 2018. Claimant participated. Employer participated through owner/manager Mike Pothoff and wash manager (now voluntarily a wash laborer) Shane Blake. The administrative law judge took official notice of the administrative record, including fact-finding documents and benefit payment records.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time car wash manager paid by the hour. She was hired to work Monday through Saturday from 8:00 a.m. to 4:00 p.m. Because there was generally more than one manager working, she was told to go home if it rained. She was also informed she could leave early since she worked every Saturday. The separation date was March 13, 2018. On that date, Pothoff called a managers' meeting with claimant and Blake. He told claimant he wanted her to work 10:00 a.m. to 6:00 p.m. on an indefinite basis because he thought she left early too often. She advised him that schedule would not work for her daycare hours. He told her to "get the fuck out of my building and leave your uniforms behind." He did not call her a "bitch." On one unknown date, Pothoff sent claimant text message disapproving of her leaving early on a sunny day. She had not done so without permission from a manager since then. The employer had not previously warned claimant her job was in jeopardy for any reasons.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id.

The decision in this case rests, at least in part, upon the credibility of the parties. While the employer did present a witness with direct knowledge of the situation, he is a subordinate employee, did not participate at the fact-finding interview, he did not provide a written statement for the fact-finding interview and his knowledge of events was not specified in the fact-finding interview notes. Furthermore, in Blake's written statement found in the administrative record, purportedly written on March 13, he wrote "a couple of hours before our meeting Seantelle told me to be prepared to be the only manager because she was quitting and that was her last day." At hearing he testified only that he had heard her tell others some months earlier that she was going to try to get fired so she could get unemployment insurance benefits and work her other job for cash.[1] In his second written statement from March 13, 2018, in the administrative record, he wrote that she told him directly. While the claimant certainly has credibility issues as well, the verbal abuse of the Appeals Bureau clerk on May 7, 2017, when he called late after not answering his phone for the scheduled hearing on that date, enhances claimant's veracity in her fact-finding interview statement about verbal abuse at work. Accordingly, the administrative law judge concludes that, overall, the claimant's recollection of the events is more credible than that of the employer. Thus, the separation will be addressed as a discharge and not a voluntary leaving of employment.

Iowa Code section 96.5(2)a provides:

> **Causes for disqualification.**
>
> 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 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.*

[1] The administrative record shows wages in the second quarter of 2018, Illinois insured wages from 2 Bad Boyz LLC.

> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

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.

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

**DECISION:**

The April 11, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Benefits were exhausted the week-ending June 16, 2018.

**REMAND:** Given some of the questions raised at hearing, the the issue of whether claimant has made an earnest and active search for work during her claim for benefits is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination with notice and appeal rights to claimant.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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