

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

THERESA R DRISKELL
Claimant

APPEAL NO: 10A-UI-16264-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMANA NORDSTROM INC
SEVEN VILLAGES RESTAURANT
Employer

OC: 10/17/10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Theresa R. Driskell (claimant) appealed a representative's November 24, 2010 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Amana Nordstrom, Inc. / Seven Villages Restaurant (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 13, 2011. This appeal was consolidated for hearing with one related appeal, 10A-UI-16265-DT. The claimant participated in the hearing. Michelle Couch appeared on the employer's behalf. Based on the evidence, the arguments of the parties, 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 work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in July 2008. She worked full time as a front desk clerk at the employer's hotel. Her last day of work was October 21, 2010. The employer discharged her on October 23, 2010. The reason asserted for the discharge was causing dissension due to discussing pay with other employees.

On or about October 8 another employee had opened her check and showed it to the claimant; the check indicated that the other employee, who was a newer employee, was earning \$9.50 per hour, while the claimant was only earning \$9.00 per hour. On October 9 the claimant inquired of her general manager, Ms. Couch, as to why a new hire would be receiving a higher pay; Ms. Couch did not make any substantive response.

On October 10 another newly hired employee was allegedly going around bragging that he was earning a higher wage than previously hired employees. On or about October 13 another employee supposedly reported that the claimant had been complaining to other employees about this employee's conduct and pay. The claimant denied she had any conversations with

other employees regarding specific pay issues other than when the first employee had shown her the paycheck and her comment to that to Ms. Couch. The employer does not have any formal policies regarding the discussion of pay issues.

The claimant established an unemployment insurance benefit year effective October 17, 2010. Her weekly benefit amount was calculated to be \$193.00. She filed a weekly claim for one week, the week ending October 23, 2010, in which she reported wages of \$180.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is her supposed causing of dissension due to discussing pay issues. The employer relies on the second-hand account from other employees; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those employees might have been mistaken, whether they actually observed a specific incident, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the report. Under the circumstances of this case, the administrative law judge finds the claimant's denial more credible. Further, the employer does not have a specific or clear policy on the matter; at worst, the claimant's mention of the pay issue was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, or was a good faith error in judgment or discretion. Finally, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred more than ten days prior to the employer's discharge of the claimant. The employer has not met its burden to show

disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's November 24, 2010 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css