

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

LAURA N BISHOP  
1509 – 57<sup>TH</sup> PL  
DES MOINES IA 50311-2017

OS RESTAURANT SERVICES INC  
c/o STATE TAX SOLUTIONS INC  
2202 NW SHORE BLVD 5 FL  
TAMPA FL 33607

OS RESTAURANT SERVICES INC  
c/o STATE TAX SOLUTIONS INC  
5401 W KENNEDY BLVD STE 731  
TAMPA FL 33609

Appeal Number: 06A-UI-04619-RT  
OC: 04-02-06 R: 02  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, OS Restaurant Services, Inc., filed a timely appeal from an unemployment insurance decision dated April 20, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Laura N. Bishop. After due notice was issued, a telephone hearing was held on May 16, 2006, with the claimant participating. Nicholas Hartcorn was available to testify for the claimant but not called because his testimony would have been repetitive and unnecessary. Terry Everton, Wine Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. The claimant spoke with the administrative

law judge at 4:48 p.m. on May 10, 2006 in regards to a continuance. One witness was in Colorado and another witness was in Florida. Because the witness in Colorado was available as was the claimant, the administrative law judge denied the claimant's request to continue the hearing but stated that if the witness in Florida was crucial, the administrative law judge could recess the hearing and take the evidence of that witness when the witness was available. At the completion of the hearing, the administrative law judge concluded that the witness in Florida was not necessary.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time server from August 4, 2005 until she was discharged on March 27, 2006. She averaged between 23 and 25 hours per week. The claimant was discharged for alleged insubordination arising out of an incident between the employer's witness, Terry Everton, Wine Manager, and the claimant's boyfriend, Nicholas Hartcorn, on March 27, 2006. Prior to March 27, 2006, the employer heard rumors that the claimant and her boyfriend were spreading rumors about relationships between the operating partners of the employer and certain employees of the employer. However, the evidence did not establish that the claimant and Mr. Hartcorn were, in fact, spreading such rumors. In any event, Mr. Everton had confronted the claimant on several occasions about these rumors and the claimant had consistently denied that she had spread the rumors. The employer's operating partner told Mr. Everton to confront the claimant and Mr. Hartcorn when they were together.

On March 27, 2006, after completing her shift, the claimant and Mr. Hartcorn were dining at the employer's establishment. Mr. Everton approached the two and sat down next to them and confronted them about the alleged rumors. Words were exchanged. Mr. Everton threatened to have the claimant fired from his position with a competing restaurant and the claimant threatened to break Mr. Everton's other knee and asked Mr. Everton at least once for him to step outside. Mr. Everton then got up and left but Mr. Hartcorn followed him and asked to speak to him. Mr. Everton declined and Mr. Hartcorn made additional threatening comments. The claimant came up to the two and Mr. Everton told the claimant to remove Mr. Hartcorn. The claimant had several opportunities to do so but was unable to do so. At one point the claimant responded to Mr. Hartcorn that Mr. Everton was being immature and Mr. Hartcorn should not stoop to his level. The claimant was then discharged for that statement. Eventually others in the restaurant were able to remove Mr. Hartcorn and the claimant followed. Later that evening Mr. Hartcorn, without the claimant, went to the home of the operating partner of the employer and tried to escalate the matter but without success. The operating partner told Mr. Hartcorn to leave and he did. The only written warning the claimant had received occurred two weeks earlier concerning her service. During the exchanges between Mr. Everton and Mr. Hartcorn, no profanity was used by either. Pursuant to her claim for unemployment insurance benefits filed effective April 2, 2006, the claimant has received unemployment insurance benefits in the amount of \$690.00 as follows: \$230.00 per week for three weeks from benefit week ending April 8, 2006 to benefit week ending April 22, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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).

About the only thing upon which the parties agree is that the claimant was discharged on March 27, 2006, and the administrative law judge so concludes. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. At the outset, the administrative law judge is compelled to state that each party accused the other of immature behavior and this is like each kettle calling the other black. The behavior of both the claimant's boyfriend, Nicholas Hartcorn and the employer's witness, Terry Everton, Wine Manager, were most immature and irresponsible and not the kind of behavior one would expect from adults. Mr. Hartcorn was not an employee of the employer. After confronting the claimant on several occasions about alleged rumors that the claimant was supposed to have

been spreading along with Mr. Hartcorn about the operating partners of the employer, and after receiving direct denials from the claimant, Mr. Everton decided to confront the claimant and Mr. Hartcorn while they were eating in the employer's establishment after the claimant was off duty. It appears to the administrative law judge that Mr. Everton was attempting to pick a fight of some sort with Mr. Hartcorn. His efforts were successful. Mr. Hartcorn apparently was most happy to engage in an argument and threats with Mr. Everton. Mr. Everton claimed that he made no threats or inappropriate statements to Mr. Hartcorn but his testimony is not credible. He is the one who initiated the confrontation by sitting down at the table where the claimant and Mr. Hartcorn were dining. The claimant testified that Mr. Everton threatened the job of Mr. Hartcorn. Mr. Everton testified that Mr. Hartcorn threatened to break his other knee and at least once offered for Mr. Everton and Mr. Hartcorn to step outside. At least Mr. Everton got up and left but Mr. Hartcorn did not want to let the matter drop at that point and followed Mr. Everton and renewed the confrontation. More words were exchanged between the two. It is at this point that the claimant got involved.

The claimant made some comment to Mr. Hartcorn that his behavior should not be immature as that of Mr. Everton. As noted above, the behavior of both Mr. Hartcorn and Mr. Everton was immature. In any event, after the claimant's statement, she was discharged. The claimant's involvement was merely indirect. Mr. Everton testified that the claimant was discharged because after four opportunities she did not remove Mr. Hartcorn from the restaurant. It is pretty clear to the administrative law judge that the claimant had no control over Mr. Hartcorn nor did she have any control over Mr. Everton and it would be unreasonable to expect the claimant to remove either one. It may well be that the claimant's statement was inappropriate and it may well be that the claimant should have made additional efforts to remove Mr. Hartcorn but the administrative law judge concludes, in view of the circumstances here, that those failures on the part of the claimant do not rise to the level of disqualifying misconduct. There is not a preponderance of the evidence that the claimant actually spread the rumors of which she was accused or that she precipitated the confrontation between Mr. Everton and Mr. Hartcorn or that she even participated in such confrontation. The claimant did try to defuse the situation. It may be that the claimant did not expend enough effort to do so but her failures here are not deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor do they evince a willful or wanton disregard of the employer's interests nor are they carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The only evidence of any warnings to the claimant was a warning two weeks earlier for service and this is unrelated to the reason for her discharge.

In summary, and for all the reasons set out above, the administrative law judge concludes that there is not a preponderance of the evidence of any disqualifying misconduct on the part of the claimant. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$690.00 since separating from the employer herein on or about March 27, 2006 and filing for such benefits effective April 2, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 20, 2006, reference 01, is affirmed. The claimant, Laura N. Bishop, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/pjs