IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PENNY F WRIGHT Claimant **ANNETT HOLDINGS INC** Employer	**APPEAL 19A-UI-09426-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/27/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Penny F. Wright, filed an appeal from the November 20, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits.

A first hearing was scheduled to be held on December 26, 2019. The hearing was continued at the employer's request to allow Todd Bordenaro and Melissa Zollman to participate. The parties were properly notified about the second hearing. A telephone hearing was held on January 8, 2020. The claimant participated personally. Janelle Wright and Lisa Brown testified on behalf of the claimant. Becky Fees and Terri Neff were listed as potential witnesses but did not testify. The employer, Annett Holdings Inc., participated through Todd Bordenaro, general manager. Employer witnesses included Lonnie Johnson (maintenance manager), Jarrett Coon (front desk agent/gift shop manager), and Marcia Lane (front desk agent). Melissa Zollman was listed as a potential employer witness but did not attend the hearing.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-6 were admitted and Claimant Exhibits A-D were admitted into evidence. 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 was employed full-time as a front desk agent and was separated from employment on October 19, 2019, when she was discharged (Employer Exhibit 4).

The employer operates a hotel. The claimant began employment with this employer on July 20, 2018. At the time of hire, she was trained on employer rules and procedures (Employer Exhibits 1, 6). Prior to October 1, 2019, the claimant had no disciplinary action.

On October 1, 2019, the employer and claimant met. The claimant had previously raised concerns with scheduling to Mr. Bordenaro and when he had not addressed them, she escalated the matter to human resources. The claimant opined she felt targeted by the employer after voicing concerns inasmuch as her attitude and conduct had not previously been addressed by the employer. During the meeting, the claimant acknowledged she became upset, and loud. The employer stated it issued the claimant a "verbal performance improvement plan" based upon her conduct (Bordenaro testimony).

The employer completed a document labeled "employee discipline and performance improvement plan- corrective action form" detailing the employer's account of the meeting. The document contained verbiage at the bottom which said "A copy of this corrective action will be placed in your personal file for reference, which may affect your performance review" (Employer Exhibit 2). The document also contained a section for an employee signature and employee comments. Under the section of employee comments, the employer typed in, "Penny was very emotional and combative and not ready to accept any responsibility for her actions. Did say she would not have her husband hang out anymore" (Employer Exhibit 2). The undisputed evidence is the document was never presented to the claimant to review or sign.

On October 10, 2019, the employer held a second meeting with the claimant to follow up. The claimant brought her daughter, Janelle Wright, as a witness. Mr. Bordenaro told the claimant at the meeting that she had a "bad attitude" and that she had two weeks to change her attitude and the employer would reconvene. During the conversation, the claimant asked three times for specific items that she needed to change or improve upon, and received no response from the employer (Penny Wright testimony). After the meeting, the employer drafted another document using the same employee discipline and performance improvement plan- corrective action form" but did not present the document to the claimant to review, sign or comment (Employer Exhibit 3).

Over the weekend of October 10-12, 2019, the claimant worked and on October 14 or 15, 2019, Mr. Bordenaro stated he received three complaints from employees and guests which had occurred over the weekend. The first complaint was from an employee who was having his wedding reception at the hotel. Mr. Bordenaro stated the guest employee informed him that the claimant did not provide good customer service and appeared defiant when he asked her to lock up the banquet room containing gifts and money, which is a customary request. The undisputed evidence was that she acknowledged the request and that she would get to it. However, her co-worker, Eva Hunter, offered to go lock up instead.

A second complaint was reported by another guest/employee stating she demanded an off-duty driver to move a vehicle. The employer asserted it was the claimant's job. The claimant does not have a valid license and had been told by several off duty drivers that they would move vehicles for her. A third complaint was reported by Eva Hunter (Employer Exhibit 5) regarding the claimant snapping at people and her observations from working together. The employer did not ask the claimant for her account of what happened that weekend before discharging her.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.
Iowa 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 Administrative Code rule 871-24.32(1)a provides:

> "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).

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*. In the case at hand, the claimant appeared personally, provided sworn testimony, answered questions, and subjected herself to possibility of cross-examination. In contrast, the employer presented no first hand testimony regarding the final incidents which led to discharge. In the absence of any other evidence of equal weight either explaining or contradicting the claimant's testimony, it is held that the weight of evidence is established in favor of the claimant. Assessing the credibility of the witnesses 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.

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In this case, the employer asserted it had previously warned the claimant repeatedly for conduct and put her on notice that her job was in jeopardy before she was discharged. However, the credible evidence presented is the employer did fill out detailed disciplinary forms intended for employees to see (based upon verbiage on the form), yet never showed them to the claimant or allowed her an opportunity to respond with comments. During the last conversation or verbal coaching with the employer, the claimant repeatedly asked for specific examples of what she needed to do to improve and was given no information. As such, she could not have reasonably anticipated she would be discharged. The administrative law judge is not persuaded the claimant's conversations with the employer on October 1 and 10 would constitute sufficient warning. Further, it cannot be ignored that the claimant had no discipline for over a year of employment and only after she escalated a matter over her manager (who was unresponsive), was she suddenly being told she had a bad attitude and pulled into conversations criticizing her job performance.

Inasmuch as the employer had not previously warned the claimant sufficiently about the issue leading to the separation, it has not met the burden of proof to establish that the 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. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The unemployment insurance decision dated November 20, 2019 (reference 01) 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.

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Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

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Decision Dated and Mailed

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