

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE A CLAYTON
Claimant

APPEAL NO. 07A-UI-01109-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RESTAURANT RESOURCES INC
Employer

**OC: 12/24/06 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Restaurant Resources (Pizza Hut) filed a timely appeal from the January 19, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 15, 2007. Claimant Michelle Clayton participated. District Manager Steve Dopson represented the employer and presented additional testimony through Christopher Miller, Vice President of Operations. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Clayton was employed by Restaurant Resources (Pizza Hut) as a full-time Assistant Manager from September 30, 2005 until December 30, 2006, when District Manager Steve Dopson discharged her for alleged misconduct. On December 30, Mr. Dopson and a manager-in-training, Steve Little, were at the restaurant where Ms. Clayton worked. At some point, Mr. Dopson left the restaurant, but Mr. Little stayed behind to assist with business operations. The restaurant was busy at the time. Mr. Little became upset when Ms. Clayton put a 10-piece order of hot chicken wings into the pizza oven without using a pan underneath to support the order. When the wing order was done in the oven, Ms. Clayton retrieved the hot chicken wings. As Ms. Clayton retrieved the order, two of the wings fell to the floor. Ms. Clayton discarded the two contaminated wings, boxed the remaining wings and sent the order to the customer. Soon thereafter, Mr. Little reported to Mr. Dopson that Ms. Clayton had picked up food that had fallen on the floor and had served it to the customer. Mr. Dopson returned to the restaurant and summoned Ms. Clayton outside for a meeting. Mr. Dopson critiqued Ms. Clayton's attitude and management skills, and critiqued the restaurant's operations. Mr. Dopson told Ms. Clayton that she was discharged from the employment. Ms. Clayton continued to plead for her job. Mr. Dopson asked if Ms. Clayton had picked up wings that had fallen on the floor and served them to a customer. Ms. Clayton denied doing so. Mr. Dopson indicated that he believed his

source. Mr. Dopson indicated that he would consider whether he should reverse his decision to discharge Ms. Clayton. Mr. Dopson did not reverse his decision.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge notes that the employer failed to present testimony from the person who reported the alleged misconduct to Mr. Dopson.

The greater weight of evidence in the record fails to establish that Ms. Clayton in fact served to a customer chicken wings that fell on the restaurant floor. The employer failed to present sufficient direct and satisfactory evidence to prove, by a preponderance of the evidence, that the alleged event actually occurred. The evidence demonstrates that the employer had several other concerns about Ms. Clayton's performance and seized the allegation concerning the contaminated chicken wings as an opportunity to sever the employment relationship. The administrative law judge notes that Mr. Dopson, in testifying about the allegation regarding the contaminated wings, characterized the conduct as an error in judgment that occurred in the context of a very busy restaurant. Because good faith errors in judgment do not constitute substantial misconduct that would disqualify a claimant for unemployment insurance benefits, Ms. Clayton may very well have been eligible for benefits even if the event occurred as the employer alleged. See 871 IAC 24.32(1)(a).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Clayton was discharged for no disqualifying reason. Accordingly, Ms. Clayton is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Clayton.

DECISION:

The Agency representative's January 19, 2007, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw