IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DARCIE L NEOFOTIST
Claimant

AMERICAN BLUE RIBBON HOLDINGS LLC
Employer

APPEAL NO. 10A-UI-14609-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/19/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

American Blue Ribbon Holdings L.L.C./Village Inn (employer) appealed a representative's October 13, 2010 decision (reference 02) that concluded Darcie L. Neofotist (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 6, 2010. The claimant participated in the hearing. Lisa Harroff of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Shawn McNeeley. 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:

After one or more prior periods of employment with the employer, the claimant most recently started working for the employer on January 30, 2009. She worked full-time as a server at the employer's Bettendorf, Iowa restaurant, working a Saturday-through-Tuesday daytime schedule. Her last day of work was September 6, 2010. The employer discharged her on that date. The reason asserted for the discharge was "swiping" tips meant for other servers.

The employer previously had received some reports that servers believed the claimant was "swiping" their tips; there had been an incident about a week prior to September 6 where a customer observed the claimant picking up a $4.00 tip meant for another server. When asked about the situation, the claimant acknowledged that it was possible she may have picked up the tip by mistake as she was distracted by another matter that day; she gave the assistant manager $4.00 to give to the server. No disciplinary action or warning resulted from this incident, but the general manager began to focus in on the claimant's activities.

On September 6 the claimant was as usual working until 5:00 p.m.; the other day servers usually got off work between 3:00 p.m. and 3:30 p.m. There had been a server working in the

claimant's area during a time the claimant was on break; when the claimant came back from break, she reminded the other server to bus her tables and pick up her money before she left for the day. If a server is not able to stay and clear off her own tables before leaving, the normal practice is that the departing server will leave some kind of note for or communicate with the remaining server to indicate they had not been able to finish clearing specified tables.

By about 3:30 p.m. the other server had left for the day but had not cleared at least two of her tables; however, she had not left any note for the claimant or otherwise communicated with the claimant regarding her unbussed tables. One of those tables had a $3.00 tip and the other had a $5.00 tip. The claimant proceeded to bus all of the dirty tables in her section, including the two which had been served by the other server. For the table which had a $3.00 tip the claimant wrapped the tip up with a note for the other server and put it in the back of her serving notepad to give to a manager at the end of her own shift. She had not recalled or recognized that the other table was also one the other waitress had failed to clear before leaving, and so took the $5.00 for herself. At about 4:00 p.m., as the claimant was heading out to the serving floor with a tray of drinks, the assistant manager asked the claimant if she was holding anyone else's tips, and the claimant indicated she did have a tip to turn in for the other server. When she came back from the serving floor a few minutes later, she retrieved the $3.00 and note from the back of her serving notepad and gave it to the assistant manager. Nothing was said or asked about the other $5.00 tip; the claimant did not address it, as she had assumed it was hers.

The claimant then finished her shift at 5:00 p.m. and left the restaurant, taking her tips, including the $5.00 from the other server's table, with her. Mr. McNeely, the general manager, then called the claimant and advised her she was discharged for violating the employer's zero tolerance policy for "swiping" other servers' tips. The claimant did not deny taking the $5.00 tip, but asserted to Mr. McNeely that she had believed it was hers; he did not believe or accept her explanation.

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 that 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 that 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 "swiping" of another server's tip. Misconduct requires intent. Huntoon, supra. While the employer was convinced that the claimant had taken and kept the $5.00 tip fully knowing it had not been her table, the administrative law judge finds that the claimant's testimony that she had in good faith believed it had been her table, particularly given the fact that the other server admittedly did not follow the standard procedure to communicate with the remaining server if she was leaving before clearing all of the tables she had served. The administrative law judge further finds the claimant's explanation as to her intent to be credible, as she promptly turned in the tip from the one table when queried; if she felt she was under some scrutiny at that time because she was being asked if she was holding any tips, it is more plausible that as she was turning over the tip from the one table, she would have turned that over at tip as well rather than running the risk for $5.00 that she would be accused of "swiping" that tip had she realized the tip for the second table was also for that server. Under the circumstances of this case, the claimant's taking of the other server's $5.00 tip was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was a good-faith error in judgment or discretion. 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 October 13, 2010 decision (reference 02) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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