IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARANDA M STEPHENS Claimant **WEBSTER RESTAURANT LLC** Employer	**APPEAL 21A-UI-20683-CS-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/06/21** **Claimant: Appellant (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On September 9, 2021, the claimant/appellant filed an appeal from the August 31, 2021, (reference 02) unemployment insurance decision that disallowed benefits based on claimant being discharged for failure to follow instructions in the performance of her job. The parties were properly notified about the hearing. A telephone hearing was held on November 8, 2021. Claimant participated at the hearing. Employer participated through Chef and Owner, Samuel Gelman. Exhibit A, 1, 2, 3, 4, 5, 6, 7, and 10 were admitted into the record. Exhibits 8 and 9 were not admitted because the documents received by the administrative law judge were blank and contained no information. Administrative notice was taken of claimant's unemployment insurance benefits records.

ISSUE:

Was the separation a discharge for job-related misconduct which disqualified claimant from benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on May 20, 2021. Claimant last worked as a full-time server. Claimant was separated from employment on June 8, 2021, when she was discharged.

When claimant began her job on May 20, 2021, she went through a training period. The employer's training period consisted of approximately five shifts. Claimant was also on a thirty-day probationary period.

Claimant completed her training period on either May 25, 2021 or May 26, 2021. Claimant receive a written warning on June 1, 2021, for substandard work. (Exhibit 4). The claimant was wrote up for repeated instance of delivering incorrect drinks and ringing in items incorrectly. Claimant was notified that if her work did not improve that she could be suspended or dismissed. (Exhibit 4) Claimant has Attention Deficit Disorder and had requested more information so she could learn

the menu. The employer did not provide her more material that she needed to adequately learn the menu.

On June 4, 2021, the employer received an email complaining about claimant's service that occurred on May 27, 2021. (Exhibit 6, pg., 1 and 3) In the complaint the patron wrote about claimant being uneducated on the menu, nervous, quiet-spoken, and bad-mouthing the restaurant's mask policy. (Exhibit 6, pg. 3) The employer did not follow up with the email to determine what comments were made by claimant. The employer did not investigate any further into the alleged disparaging comment and did not know what the claimant said to the customer.

Claimant last worked Saturday, June 5, 2021. On June 8, 2021, claimant arrived at work and was brought into a meeting with Riene Gelman and Gregory Barr. In the meeting claimant was notified that she was being terminated for substandard work and for making disparaging comments about the restaurant. (Exhibit 5) The employer had never been satisfied with claimant's work performance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Iowa Admin. Code r. 871-24.32(5) provides:

> (5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Since the employer agreed that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The employer also contends that claimant was discharged because she made disparaging comments about the restaurant. 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*. After assessing the credibility of the witnesses

who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that claimant's testimony is more credible than the employer's general testimony about claimant making disparaging comments about the restaurant. The employer could not testify with specificity what the claimant said to the patron that was disparaging. Claimant testified that she commented that she was glad she no longer had to wear a mask because it was hard for people to hear her since she is soft spoken.

A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). In considering whether specific hearsay testimony is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs" there are five factors to be considered. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607-08 (Iowa Ct.App. 1990)(citing Iowa Code § 17A.14(1)). Those factors include: (1) the nature of the hearsay, (2) the availability of better evidence, (3) the cost of acquiring better information, (4) the need for precision, and (5) the administrative policy to be fulfilled. *Id*. at 608. In this instance the employer received an email from a patron that claimed claimant was "bad-mouthing the restaurant's mask policy." The term "bad-mouthing" is a very broad term that could mean a variety of things to different people. Since employer did not investigate the matter to determine with specificity what the claimant was saying the employer has not met its burden of proof. The employer has not shown that claimant's conduct was a willful and wanton disregard of the employer's interest. The employer has not established job-related misconduct that disqualifies claimant from unemployment benefits. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The August 31, 2021, (reference 02) unemployment insurance decision is REVERSED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

December 9, 2021
Decision Dated and Mailed

cs/mh