IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHARISE M DEKEYZER Claimant **KINSETH HOTEL CORPORATION** Employer	**APPEAL 17A-UI-11546-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/15/17** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the November 3, 2017, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on December 4, 2017. Claimant participated with former front desk clerk Michelle McMaster and friend and co-parent Christopher Davis. Employer participated through general manager James Schlicting and executive travelling housekeeper Norma Weathermon. Robin Moore of Employers Unity represented the employer. Claims specialist Kristen Aragon was not available to participate at the number provided.

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: Claimant was employed as a full-time guest service manager at the front desk through October 20, 2017. On October 15 a guest from mid-July 2017 called the front desk and spoke to manager Melissa to see if the employees enjoyed the pizza party from the 100-dollar cash tip he left at the front desk in a card. He had not received a thank you note. Hood read the card at a team meeting, where McMaster was also present, and gave the cash to claimant, telling her to "hold on to it." She said she did not feel comfortable doing so. She did not have an office or personal space at the hotel like he did. He persisted so she told him she would put it in her purse. He agreed. Sometime later she switched purses and left the money in the same purse. She reminded Hood about the money and having a party multiple times until he told her he would decide when the employees deserved a party. She was off work on October 14 and Hood was separated from employment in her absence. On October 20 claimant advised incoming manager Ryan Phipps and Weathermon that she had the money at home pursuant to Hood's instruction and would return it.[1]

[1] She mailed the cash to the employer on October 23 with Davis present. The employer said it was not received so she mailed cash from her personal funds on November 20 with an overnight tracking number return receipt.

On October 16 housekeeper Laquia Logan showed Weathermon a cell phone video[2] after claimant called housekeeping staff into the office on October 14. Other staff were present and started yelling and screaming at each other, including Logan about her job performance. Claimant was her immediate supervisor and had called the meeting to quash drama and in-fighting after she became aware of bullying between African American and Hispanic housekeeping staff that morning. Specifically, Logan had called staff names in front of guests. Logan and a couple other staff were also making threats to each other on Facebook. Claimant did not have the authority to fire staff. She had to work with Hood to do that but he put her off and went on vacation. The meeting got out of control even though claimant had multiple meetings with individuals about their behavior. Logan had multiple prior disciplinary actions. For a month or more, claimant had been asking for assistance from her supervisor, general manager Derek Hood, who was not helpful. She had also asked him to contact Weathermon to visit the location. Weathermon sent claimant to a conference on October 18 and 19 without any indication there was a concern about her job performance. Weathermon worked in her absence. The employer had not previously warned claimant her job was in jeopardy for any reason.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14(1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (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. *Schmitz*, 461 N.W.2d at 608.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. Noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code section 96.5(2)a provides:

> **Causes for disqualification.**
>
> 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.

[2] The employer did not show claimant the video or offer a copy of the video as a proposed exhibit.

Iowa Admin. Code r. 871-24.32(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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The tip money incident for which claimant was discharged was the result of following instruction from Hood, her supervisor during the relevant time period. Were she to have disobeyed his direction it could have been considered insubordination so she was in a no-win situation. As to the housekeeping chaotic meeting, claimant had been asking for help from Hood for a number of weeks but received none. Again, she was discharged because of the inaction of her supervisor, Hood, in spite of her repeated efforts to engage him and address the in-fighting between housekeeping staff. She did not engage in any deliberate conduct, omission or negligence in breach of the employer's interests. Furthermore, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

DECISION:

The November 3, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs