**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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| **JENNIFER K BOWERS**<br>Claimant | **APPEAL 15A-UI-05848-JCT** |
| | **ADMINISTRATIVE LAW JUDGE DECISION** |
| **CSL INC**<br>Employer | |
| | **OC: 09/07/14**<br>**Claimant: Appellant (2)** |

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 13, 2015, (reference 08) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 24, 2015. The claimant participated with one witness, Stephanie Fuller. The employer participated through Brian Chapman, owner. No exhibits were offered or received into evidence.

**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 part-time as a bartender and was separated from employment on December 11, 2014, when she was discharged.

The employer discharged the claimant for having a patron on the premises after closing time. The employer believed the claimant allowed patron, Stephanie Fuller, to remain in the bar after closing time, because Ms. Fuller's credit card was run and she signed for it after the 2:00 a.m. close of business. The claimant was permitted to run left credit cards after 2:00 a.m. to close down but the fact Ms. Fuller signed it, suggested to the employer that Ms. Fuller had to be on the premises after closing time, since the credit card wasn't run before 2:00 a.m. The claimant was to give Ms. Fuller a ride home and Ms. Fuller went to the restroom and then went to the car to warm it up and wait for the claimant to finish her job duties. Ms. Fuller did not remain on the premises waiting to sign the credit slip but met claimant to sign it after it had been run. The claimant and Ms. Fuller both denied Ms. Fuller waited inside or stayed more than a couple minutes after 2:00 a.m. on the premises and it was to use the restroom. The employer did not present the receipt, surveillance footage or a witness who saw Ms. Fuller remain on the premises after closing time.

The employer did not ask for the claimant's explanation for a timeline or explanation from the claimant before discharge, but also believed she had been giving out free drinks, causing a loss in revenue to the employer. The claimant denied giving out free drinks. The claimant had no written disciplinary actions and had been verbally counseled for going behind the bar when drinking on the premises as a patron. The claimant was unaware her job was in jeopardy.

**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 Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

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. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

In this case, the employer discharged the claimant for having a patron in the bar after closing time. The claimant and the patron at issue both credibly testified that Ms. Fuller may have remained on the premises a few minutes late, but it was to visit the restroom before she went and waited in the car for the claimant. The fact Ms. Fuller waited in the car suggests the claimant knew she shouldn't have patrons on the premises as she closed down, and did not.

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 Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The employer offered no direct evidence or first- hand witness that Ms. Fuller was on the premises for more than a few minutes after close time or that the claimant intentionally allowed a patron on the premises after closing time. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony and witness, 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.

At most, the claimant allowed a patron to use the restroom before making her wait in the parking lot after closing time. Based on the evidence presented, the conduct for which claimant was discharged was an isolated incident of poor judgment and 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. A verbal warning to the claimant for going behind the bar while visiting as a patron is not similar to the final incident and does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. 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.

**DECISION:**

The May 13, 2015, (reference 08) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/pjs