IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KELLY B RHOTEN
Claimant

"RT OMAHA FRANCHISE LLC – LP2
"RUBY TUESDAY
Employer

APPEAL NO. 10A-UI-07580-N

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/25/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated May 19, 2010, reference 01, which denied benefits upon a finding that the claimant voluntarily quit work after being reprimanded by her employer. After due notice, a hearing was held in Council Bluffs, Iowa on November 16, 2010. The claimant participated personally. Participating on behalf of the claimant was Brian Rhoten, Attorney at Law, 229 S. Main St., Council Bluffs, Iowa 51503. The employer participated by Mr. Stan Stoll, Director of Operations and Mr. Douglas Daize, President/CEO. Claimant's Exhibit One and Employer's Exhibit A were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Ms. Kelly Rhoten was employed as a part-time server for the captioned employer d/b/a Ruby Tuesday from June 7, 2009 until March 27, 2010 when she was discharged from employment.

Ms. Rhoten was discharged based upon a guest complaint that had been forwarded to company management on March 15, 2010 in reference to service that had been provided on the afternoon of March 13, 2010. The complaint stated that the party of four adults and three children were delayed in seating although tables were available and that the waitress identified as "Kelly" delayed taking drink orders for approximately five minutes. The patron alleged that the server had some difficulty filling the drink order and then did not return to the table for 10 to 15 minutes after taking the party's food order. The patron also alleged that they had difficulty in summoning the waitress for to go boxes and that upon leaving the parties overheard the server repeatedly state, "Wow" to a very minimal tip left by the parties in protest. The patron concluded stating her unhappiness with the "completely poor service." (Exhibit One).

The complaint was brought to the attention of Kelly Rhoten in a meeting with Brian Hamilton, a company manager, on March 27, 2010. At that time Mr. Hamilton informed the claimant that she was discharged for the incident and issued Ms. Rhoten a "final counseling" document (See Exhibit A), the classification used by the employer to designate a discharge from employment. Ms. Rhoten initially believed that the complaint may have been about a second waitress who was on duty the afternoon of the incident who also was named, "Kelly." Ms. Rhoten was informed that unless the other "Kelly" was found to be the waitress at fault, Ms. Rhoten's discharge would stand.

Ms. Rhoten was unsure of her status but was aware based on Mr. Hamilton's statements, that unless the other waitress was found at fault, Ms. Rhoten's discharge effective March 27, 2010 would stand. In an effort to determine her status, Ms. Rhoten attempted to call the manager the following day on March 28, 2010. The claimant had been scheduled to work that day and was unsure of her status. Ms. Rhoten called at noon and 1:00 p.m. in an attempt to determine her status and also reporting that she was having an "anxiety attack." When the manager, Mr. Hamilton would not respond to her third attempt to reach him prior to her work shift that day, Ms. Rhoten indicated that she would not be reporting. By this juncture it appears that the employer had determined that Ms. Rhoten was the server who had been complained about and the decision to terminate on March 27, 2010 would not be rescinded. Later efforts by Ms. Rhoten to redeem her employment were unsuccessful, the employer believing that the claimant's failure to report on March 28, was unexcused.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes sufficient misconduct to warrant the denial of unemployment insurance benefits. It does not.

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 insurance benefits. Misconduct that may be serious enough to warrant the employer to discharge an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer does not have or is unwilling to furnish evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). Hearsay is admissible in administrative proceedings, however, it cannot be accorded the same weight as sworn, direct testimony providing the direct testimony is credible and not inherently improbable.

The question before the administrative law judge in this case is not whether the employer has a right to discharge an employee for the reasons stated in this case, the question is whether the discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Ms. Rhoten may have been a sound decision from a management viewpoint, the evidence in the record does not establish that the claimant engaged in an intentional act of current misconduct sufficient to warrant the denial of unemployment insurance

benefits. An employer may discharge an employee for any number of reasons or no reason at all. If it fails to meet the burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In this matter it appears that company management became aware of the complaint approximately 12 days before taking any action to determine who the offending employee was or to affect a discharge. During that time Ms. Rhoten was allowed to continue working and performing services for the company.

On March 27, 2010, Ms. Rhoten was unequivocally told by her manager that she was being discharged effective that day unless a decision was later made to rescind the discharge if another worker were found to be the server at fault. The decision to terminate Ms. Rhoten effective March 27, 2010 was not subsequently rescinded and the claimant's discharge was effective March 27, 2010. The administrative law judge concludes that the claimant's inability to report to work the following day after repeated attempts to contact the manager would not constitute misconduct. The claimant was having an anxiety attack after being told the preceding day she would be fired and the manager chose not to further communicate with the claimant.

The question then becomes whether the evidence in the record about Ms. Rhoten's conduct and the incident of March 13 is sufficient to warrant the denial of unemployment insurance benefits. The claimant testified under oath that the restaurant was short staffed during the afternoon lull that day and that an attempt had been made to explain that the restaurant was not short of tables but was short staffed. Claimant further explained that because there was no bartender on duty she was required to mix drinks that she was unfamiliar with while serving a large table of other guests as well as the most recent seven arrivals. The administrative law judge finds the claimant's testimony to be credible and not inherently improbable. The administrative law judge must accord more weight to the claimant's sworn testimony than to the hearsay statements attributed to the party that complained.

Based upon the delay in addressing the claimant's conduct that the employer was aware of 12 days before the claimant's discharge and the explanation provided by the claimant in her sworn testimony, the administrative law judge concludes that the employer has not established a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. While the claimant's discharge may have been a good business decision, it was not for disqualifying reasons. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated May 19, 2010, reference 01, is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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