

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**FRANK C WEIHS**  
Claimant

**J & D RESTAURANTS 2 INC**  
Employer

**APPEAL 18A-UI-08889-NM**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/29/18  
Claimant: Appellant (2R)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the August 17, 2018, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for conduct not in the best interest of the employer. The parties were properly notified about the hearing. A hearing was held in person in Creston, Iowa on October 10, 2018. Claimant participated and testified. Employer participated through General Manager Emma Sells. Employer's Exhibits 1 through 6 were 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: Claimant began working for employer on September 25, 2016. Claimant last worked as a part-time crew member. Claimant was separated from employment on August 2, 2018, when he was discharged.

On August 2, 2018, a customer complained that claimant had been rude to him. The customer had placed an order with claimant, who then repeated the order back to the customer. The customer indicated the order was correct, but after receiving his food returned to the counter with an incorrect item. Claimant agreed to remake the order, but advised the customer that he should be sure to listen carefully as the order was being read back next time in order to ensure it truly was accurate.

Sells testified claimant's customer service skills had been an ongoing issue through his entire employment, resulting in multiple disciplinary actions. (Exhibits 1 and 2). The most recent disciplinary action was issued on June 13, 2018 and warned that failure to improve could result in termination. (Exhibit 3). She further testified that she believed claimant did not realize he was coming off to customers as rude or coarse, so the issue persisted. Claimant testified he was doing his best to provide good customer service and was often times just trying to help the customer through education. He did not understand why some customers found him to be rude, nor was he aware of anything he could have done differently. Based on claimant's ongoing issues with customer service the decision was made to discharge him from employment. (Exhibit 2).

## 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). 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.

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).

Here, claimant testified he was doing his best to provide good customer service and did not understand why people thought he was being rude. The employer agreed this was an ongoing issue from the beginning of claimant's employment and claimant seemed unaware of how his communication style came off to the customers. It does not appear as though claimant was deliberately being rude to customers, but rather, he lacks the necessary disposition and communication skills necessary to work in a position such as this. Since the employer agreed that claimant had never had a sustained period of time during which he performed his job duties to employer's satisfaction and inasmuch as he did attempt to perform the job to the best of his 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). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

**DECISION:**

The August 17, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

**REMAND:**

At the time of the hearing, claimant mentioned he needs to limit his work hours in order to maintain his housing. The issue of whether claimant is able to and available for work is therefore remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs