

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDY M BITTER
Claimant

APPEAL NO. 08A-UI-03098-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MATCO RESTAURANTS INC
Employer

**OC: 02/24/08 R: 04
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Judy Bitter filed a timely appeal from the March 25, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on May 7, 2008 and concluded on May 9, 2008. Ms. Bitter participated and presented additional testimony through Becky Bellows, Laurie Mellon, and Sheri Kintzle. Tom DeMoss represented the employer and presented additional testimony through Denise Switzer. Exhibits One through Six, Eight through Eighteen, and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Judy Bitter was employed by Matco Restaurants, Inc., as a full-time waitress at Village Inn Restaurant from July 19, 2005 until February 26, 2008, when General Manager Tom DeMoss discharged her.

The final incident that prompted the discharge occurred on February 23, 2008, when Ms. Bitter discussed with fellow waitresses her concerns about waitress Shawn Perry. The discussion took place in the area the food servers used at the front of the kitchen. Ms. Bitter told waitress Laurie Mellon that during a prior shift, Ms. Perry had insisted on assisting Ms. Bitter with filling a prescription for pain medication, that Ms. Perry had taken the prescription note to Walgreens, that Ms. Perry had collected the prescription and that when Ms. Perry delivered the pain medication to Ms. Bitter, the bottle was missing eight pills. Ms. Bitter had been at work at Village Inn at the time Ms. Perry had insisted on helping obtain the prescription. At the same time Ms. Bitter discussed this incident, she mentioned another incident where Ms. Perry had come to her house unexpectedly and had taken some prescription pills while Ms. Bitter stepped outside momentarily. In speaking with Ms. Mellon, Ms. Bitter was expressing concern for Ms. Perry's wellbeing and asking Ms. Mellon what she thought she should do about the situation. Other waitresses were in and out of the area where the conversation occurred. Waitress Becky Bellows joined the conversation and told Ms. Bitter that she was at fault for

placing Ms. Perry in a tempting situation. Ms. Bellows had had her own experience with Ms. Perry's addiction, when Ms. Perry had come to her home and had taken some of Ms. Bellows' husband's prescription medication. It was common knowledge in the restaurant that Ms. Perry had a substance abuse problem that involved prescription medication. It was common knowledge that Ms. Perry was suspected of stealing prescription pills from a purse in the manager's office.

As Ms. Bellows was telling Ms. Bitter in a raised voice that she faulted Ms. Bitter for allowing Ms. Perry to take the prescription to Walgreens, Assistant General Manager Denise Switzer stepped into the area. Ms. Switzer told the waitresses to "knock it off" and to "shut up." Ms. Bitter moved to a different area of the food servers' pantry and engaged another employee in a similar discussion. Ms. Switzer overheard Ms. Bitter and told the waitresses to "break it up" and to "drop it" because the matter was not work-related.

At the end of the shift, Ms. Switzer summoned Ms. Bitter to the office. Ms. Switzer told Ms. Bitter she had just spoken to Ms. Bitter the previous day about "making waves" in the workplace. Ms. Switzer told Ms. Bitter that Ms. Bitter had "opened a can of worms" and that she was breaking the law. Ms. Switzer accused Ms. Bitter of being insubordinate. Ms. Bitter protested that Ms. Switzer did not understand where she was coming from. Ms. Bitter said that she had spoken out of concern for Ms. Perry and had spoken as a person who had had a previous problem with alcohol. Scott Krimayer, Manager in Training, was present for the discussion and told Ms. Bitter that such discussions "spread like wildfire." Ms. Switzer subsequently reported the incident to General Manager Tom DeMoss, who discharged Ms. Bitter on March 26.

On February 22, Ms. Switzer had been drawing lots to assign "side work" duties to the waitresses when another waitress commented that it seemed like certain waitresses were routinely assigned "side work" duties or work that had already been completed in the course of the shift by others. Ms. Bitter said something that indicated she agreed with the comment. Later in the shift, Ms. Switzer reprimanded Ms. Bitter for "making waves."

On December 12, Ms. Switzer had reprimanded Ms. Bitter after a dispute over who was going to handle a particular table. The table in question was part of the section assigned to Ms. Bitter when she started her shift. Another waitress had started earlier than Ms. Bitter and had started to serve the customers at that table. The customers were waiting for others to join them, had received drinks, and their food order had not yet been placed. Ms. Bitter arranged with the other waitress to take over service at the table. Such matters were generally left for the wait staff to resolve by agreement. Ms. Switzer overheard the conversation and declared that Ms. Bitter could not take over service at the table. On December 13, Ms. Switzer overheard another waitress offering Ms. Bitter a table the waitress had started but which was now in Ms. Switzer's station. Ms. Bitter told the waitress she could not take the table because of Ms. Switzer's decision the previous day. Ms. Switzer lost her temper and began yelling at Ms. Bitter. Ms. Switzer told Ms. Bitter that she was greedy. When Ms. Bitter attempted to respond, Ms. Switzer told Ms. Bitter she was not going to argue with her and told Ms. Bitter to clock out and go home. Ms. Bitter continued to protest that she had done nothing wrong and pleaded to be able to stay and work. Ms. Bitter went to the office and contacted Mr. DeMoss at home to discuss the incident. Mr. DeMoss told Ms. Bitter that she had to listen to the manager said and to follow the manager's directives. After Ms. Bitter got off the phone, Ms. Switzer acquiesced in Ms. Bitter continuing her shift and the hosts assigned tables to Ms. Bitter. On December 14, Mr. DeMoss reprimanded Ms. Bitter for December 13 incident and told her that the next time she failed to follow a manager's directive, she would be done in the employment.

REASONING AND CONCLUSIONS OF LAW:

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.

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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly

be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The greater weight of the evidence in the record fails to establish misconduct in connection with the employment that would disqualify Ms. Bitter for unemployment insurance benefits. The evidence establishes that the conversation Ms. Bitter initiated with coworkers did in fact involve a work-related matter. The principle matter being discussed concerned what had happened during one of Ms. Bitter's recent shifts when coworker Shawn Perry insisted on helping with the prescription. The greater weight of the evidence indicates that Ms. Bitter made a good-faith error in judgment in discussing the matter at work with two other waitresses who were well aware of Ms. Perry's addiction. The evidence does not establish that Ms. Bitter acted with willful or wanton disregard of the interests of the employer by engaging in the discussion. While the employer's desire not to have the matter discussed in the midst of a busy shift was reasonable, Ms. Switzer's delivery of the message left much to be desired. It is ironic that Ms. Switzer expected and demanded instant compliance with her directives at the same time she directed disrespectful remarks toward the wait staff. These remarks included telling Ms. Bitter and others to "shut up." Though the conversation may have continued a short while longer, the evidence does not indicate that Ms. Bitter refused to follow Ms. Switzer's directive or that Ms. Bitter persisted in speaking of the matter at length after Ms. Switzer issued her directive.

The greater weight of the evidence establishes no misconduct in connection with Ms. Bitters' comment on February 22. Ms. Bitter had merely affirmed a coworker's observation that certain waitresses appeared to receive more favorable treatment. This sort of sentiment is expressed in almost every work environment and did not call for Ms. Switzer's heavy-handed response. The weight of the evidence indicates a personality conflict between Ms. Switzer and Ms. Bitter to which Ms. Switzer contributed equally.

The greater weight of the evidence fails to establish misconduct on the part of Ms. Bitter in connection with the events of December 12 and 13. Concerns over which food server gets what table are commonplace in restaurants. The evidence indicates that while the employer lacked a formal policy regarding such matters, Ms. Switzer communicated a strict policy to Ms. Bitter on December 12. There was no reason for Ms. Switzer to be surprised or offended by Ms. Bitter's reiteration of that strict policy on December 13. The evidence indicates that Ms. Switzer once

again took an unnecessarily heavy-handed, unreasonable approach to the situation. Ms. Bitter had a legitimate complaint about being sent home over the incident.

There was no insubordination and there was no misconduct in connection with the employment that would disqualify Ms. Bitter for unemployment insurance benefits. Ms. Bitter is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Bitter.

DECISION:

The Agency representative's March 25, 2008, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw