

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEECIE F TAYLOR
Claimant

APPEAL NO. 13A-UI-06568-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHUCK & JO'S INC
Employer

OC: 04/21/13
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 23, 2013, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits. The employer requested an in-person hearing. After due notice was issued, an in-person hearing was held in Dubuque on October 23, 2013. Claimant Meecie Taylor did not appear for the hearing or request postponement of the hearing. Connie Jo Miller represented the employer and presented additional testimony through Pat Ostrander. Exhibits One and Two were received into evidence. The administrative law judge took official notice of the fact-finding materials, which document the employer's participation in the fact-finding interview. The administrative law judge took official notice of the agency's administrative record (DBRO) of benefits disbursed to the claimant.

ISSUES:

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

Whether the employer's account may be charged for benefits.

Whether the claimant has been overpaid benefits.

Whether the claimant is required to repay benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Connie Jo Miller owned and operated Jo's Place, a restaurant in Dubuque. Ms. Miller's business employed Meecie Taylor as a part-time waitress from November 2012 until April 15, 2013, when Ms. Miller discharged Ms. Taylor from the employment for repeated discussion of restaurant business with customers in violation of the employer's work rules and in violation of prior directives issued by the employer. On April 14, 2013, Ms. Taylor complained to multiple customers that she was not getting her fair share of tables. Ms. Taylor was working with

another waitress at the time, Stacey Rohmer. The employer's policy was to alternate between the waitresses in distributing tables so that each would receive a comparable number of tables. Ms. Rohmer had one or two more tables than Ms. Taylor that day, but Ms. Rohmer has started her shift two hours earlier than Ms. Taylor. On April 14, two customers asked Ms. Rohmer why Ms. Taylor was being mistreated in the table assignment. Ms. Rohmer reported the customers' remarks to Ms. Miller at the end of the shift. Ms. Miller had counseled Ms. Taylor on multiple occasions not to discuss her work concerns or restaurant business with patrons. The employer had issued verbal warnings and a written warning to Ms. Taylor for prior similar conduct. When Ms. Miller learned that the conduct had occurred yet again, she considered the matter and then discharged Ms. Taylor from the employment the next day.

Ms. Taylor established a claim for unemployment insurance benefits that was effective April 21, 2013 and received \$1,235.00 in benefits for the period of April 21, 2013 through June 8, 2013 and July 7, 2013 through September 9, 2013.

The employer participated in the fact-finding interview that led to the lower decision that allowed benefits.

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).

The evidence in the record establishes that Ms. Taylor repeatedly violated the employer's reasonable directive that she not discuss her work concerns and restaurant business with customers. The employer's directives were reasonable in that Ms. Taylor's job was to make certain that customers were served competently and courteously. Customers had no need to be privy to workplace issues and Ms. Taylor had no legitimate reason to discuss such matters with customers. Ms. Taylor's repeated violation of the same work rule indicated a willful disregard of the employer's interests and amounted to insubordination.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Taylor was discharged for misconduct. Accordingly, Ms. Taylor is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer participated in the fact-finding interview that led to the lower decision. The employer's account shall not be charged for benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the

employer failed to participate in the initial proceeding that awarded benefits. See Iowa Code section 96.3(7)(a) and (b).

Ms. Taylor received \$1,235.00 in benefits and has by this decision been deemed ineligible for those benefits. Those benefits constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Taylor is required to repay the benefits she has received.

DECISION:

The agency representative's May 23, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged for benefits. The claimant is overpaid \$1,235.00 in benefits for the period of April 21, 2013 through June 8, 2013 and July 7, 2013 through September 9, 2013. The claimant must repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css