IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMMY J BURNS
Claimant

VALLEY INN LLC
Employer

APPEAL NO. 11A-UI-09292 -VS

ADMINISTRATIVE LAW JUDGE DECISION

OC:06/19/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:
The claimant filed an appeal from a representative's decision dated July 12, 2011, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 17, 2011, in Davenport, Iowa. The claimant participated. The claimant was represented by Edward Isaac. Lindsey Carelton and Arnold Fentress were witnesses for the claimant. The employer participated by Curtis Blaum, owner, and Rachel Carpenter, general manager. The record consists of the testimony of Curtis Blaum; the testimony of Rachel Carpenter; the testimony of Arnold Fentress; the testimony of Lindsey Carelton; the testimony of Edward Isaac; Claimant's Exhibit A; and Employer's Exhibits 2A through 12. The administrative law judge did not admit into evidence what had been marked previously as Employer's Exhibit 1.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a bar and restaurant located in Pleasant Valley, Iowa. The claimant was hired in May or June of 2010 to serve as manager. The claimant was responsible for ordering food and liquor, bookkeeping, hiring restaurant staff, and paying bills. Her last day of work was June 18, 2011. She was terminated on June 20, 2011.

The owner, Curtis Blaum, was dissatisfied with the financial results of the business. He had had several discussions with the claimant concerning overdrafts that had occurred in the checking account. The claimant was a signatory on the checking account and was responsible for paying some, but not all, of the bills. She did not pay taxes nor did she control what money was taken out of the business by the owner. She did not have access to online banking and did not have information on the balance in the checking account. She asked several times for access to online banking, but that request was denied.

In early June 2011, Mr. Blaum approached Rachel Carpenter and asked her for advice on how to improve operations of the business to avoid the overdrafts. Ms. Carpenter made several suggestions, such as counting empty liquor bottles. Mr. Blaum decided to demote Ms. Burns to bartender and promote Ms. Carpenter to general manager. The demotion occurred on June 18, 2011. The claimant was asked not to discuss with customers the reasons for the demotion. The claimant came to work on June 20, 2011. After she left work, she received a phone call from Ms. Carpenter. Ms. Carpenter terminated the claimant during that phone call.

After the claimant's termination, Mr. Blaum received some inquiries about a Cubs trip that the claimant and another individual named Arnold "Sam" Fentress had put together. Mr. Blaum had no part in conceiving the trip nor did he make any arrangements for the trip. The employer did not advance any money for the trip and had no financial interest in the trip. Mr. Blaum wanted nothing to do with the trip. A pre-departure party was planned for the employer's place of business. The food, however, was being purchased from funds paid by attendees and the claimant and some volunteers were going to cook it up. The only potential source of profit for the employer was liquor sales at a Bloody Mary bar. The trip was advertised at the Valley Inn with posters made up by one of the employer's vendors. There was also mention of the trip on the Valley Inn webpage.

Mr. Blaum felt that the business was entitled to both the ticket money that had been collected and any profit that the trip made. He began to repeatedly call the claimant and Sam Fentress about the money. The claimant eventually had to go to the police, who advised her that the money did not belong to Mr. Blaum. Mr. Fentress made the decision to move the pre-departure party to another restaurant. He was disturbed by some of the comments made by Mr. Blaum about the claimant and what was posted by Mr. Blaum on Facebook. He had tried to talk Mr. Blaum out of such statements.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Unsatisfactory job performance is not misconduct. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v.EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record that the claimant was discharged for a current act of misconduct. The claimant was demoted to bartender from manager because Mr. Blaum was unhappy about the overdrafts at the bank and the lack of profits. He turned to Ms. Carpenter and felt that she would be a better choice for manager. The demotion took place on June 18, 2011. There was no evidence that the demotion had anything whatsoever to do with the Cubs bus trip or allegations that the claimant was taking food away without paying for it.

Ms. Carpenter then terminated the claimant on June 20, 2011, after supposedly hearing a conversation where the claimant made disparaging comments to a customer about her demotion. This was the immediate cause of the termination. The claimant denied making this statement. The administrative law judge carefully observed the witnesses when testifying and weighed their testimony. Ms. Carpenter was not a credible witness. Both her testimony and Mr. Blaum's testimony were laden with animosity above and beyond what might be normally expected. Ms. Carpenter made accusations about the claimant taking home food for her children that were not corroborated by any credible evidence whatsoever. She claimed the claimant poured too many shots and did not collect money for them. Other witnesses disputed that testimony and specifically said that the claimant took money out of her tip jar to pay for the shots. The claimant was not evasive when testifying and her testimony was corroborated by equally credible and non-interested parties.

Mr. Blaum's testimony that the employer was entitled to the profits from the Cubs trip is completely unbelievable. Even if the claimant had done something wrong by collecting money for a trip that she and another individual conceived and planned, this whole controversy came up AFTER the claimant was terminated. It had nothing to do with either her demotion or her termination. Mr. Blaum demoted the claimant for unsatisfactory job performance, which is not misconduct. The claimant was terminated by Ms. Carpenter for making a disparaging comment about her demotion. The administrative law judge has concluded that that conversation with the patron did not happen. It was only after the claimant was terminated that Mr. Blaum started claiming that the employer was entitled to the Cubs money. This position is untenable. The

employer did not conceive of the trip, did not advance money for the trip, did not make arrangements for the trip, and had no real financial interest in the trip. Mr. Fentress was an especially credible witness. He pointed out that the trip was never designed to make a profit for anyone. He and the claimant planned the trip. He made the decision to move the pre-departure party. He personally advanced the money for the buses. He noted that if the trip had lost money and he called Mr. Blaum to cover the loss, Mr. Blaum would have refused.

The greater weight of the credible evidence in this case is that claimant was not discharged for a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated July 12, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw