

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARIA S MELLO**  
Claimant

**APPEAL NO. 13A-UI-07675-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ISLE OF CAPRI MARQUETTE INC  
LADY LUCK CASINO MARQUETTE**  
Employer

**OC: 06/02/13  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Isle of Capri Marquette (employer) appealed a representative's June 20, 2013 decision (reference 01) that concluded Maria Mello (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 2, 2013. The claimant participated personally. The employer participated by Mark Witter, Director of Human Resources. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 10, 2012, as a full-time bartender/server in the casino. The claimant signed for receipt of the employer's handbook on January 10, 2012. The employer issued the claimant a written warning on July 3, 2012, for till variance. The employer notified the claimant that further infractions could result in termination from employment. On April 12, 2013, the employer issued a final written warning and suspension for having an altercation with a co-worker. The co-worker made untrue allegations about the claimant. The employer notified the claimant that further infractions could result in termination from employment.

On May 31, 2013, the claimant asked a co-worker where she was. The claimant jokingly said she was on the boat. The claimant asked why she was calling her at work. The two parted after the claimant asked if the co-worker was having a bad day. The claimant was careful with this co-worker because she knew she had made allegations in the past. Later the coworker told the employer that the claimant had a verbal altercation with her. The employer took statements from co-workers and watched video of the claimant. Based on the claimant's large arm movements after she left the co-worker, the employer assumed the claimant had an altercation

with the co-worker. The employer suspended the claimant on May 31, 2013, and terminated her on June 4, 2013.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose to provide written statements. The statements do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's June 20, 2013 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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