IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ALICIA D GARMOE
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FIRE MOUNTAIN RESTAURANTS INC
C/O TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216 1160

Appeal Number: 05A-UI-06161-H2T
OC: 05-15-05 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 2, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 28, 2005. The claimant did participate. The employer did participate through (representative) Brian Nelton, Store Manager, and Lauren Anthony, Assistant Manager. Employer's Exhibit One was received, with the exception of one page which was illegible. The hearing was continued so the employer could submit clean copies of the exhibits they had previously submitted which were illegible. The employer did not submit any additional exhibits or any clean legible copies of any exhibits. The hearing continued after due notice on July 18, 2005. The claimant did participate. The employer did participate through Jim Jones, General Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a server full time beginning September 30, 2003 through April 28, 2005 when she was discharged. The claimant was scheduled to work on April 27, 2005 from 9:00 a.m. until 8:00 p.m. When she arrived at work she told manager Lauren that her back hurt and that she did not know if she would be able to complete her work shift. Lauren began calling other employees to see if she could find someone to cover the claimant's shift. Greg Silver arrived at work and was scheduled to work from 9:00 a.m. until 4:00 p.m. Greg agreed to switch shifts with the claimant so that he would work until 8:00 p.m. and the claimant would only have to work until 4:00 p.m. Lauren specifically approved the shift trade between the claimant and Greg.

When the claimant returned to work the next day, April 28 she began working but was soon told to go home and that she would not be allowed to continue working until she brought in a doctor's note for April 27, 2005. The claimant told the employer that she did not believe she needed to have a doctor's note because she had traded shifts with another employee, not gone home sick. Nothing in the employer's policy requires that employees present doctor's notes when they are absent due to illness. The claimant went to a physician and obtained a doctor's note that removed her from work from April 27 through May 15, 2005. She presented the note to her employer on May 4, 2005 and the employer, specifically Jim Jones refused to let her continue her employment. The employer refused to allow the claimant to continue working even after she presented a doctor's note they requested. When the claimant gave the note to Mr. Jones he refused to speak to her. There is no evidence that the claimant quit and the claimant does not live in Las Vegas.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The employer, specifically Mr. Jones, has acted in a completely unreasonable manner. Firstly, another manager specifically gave the claimant permission to change shifts with another employee on April 27. The claimant's shift was covered and no harm resulted to the employer. The employer has no written policy that requires employees provide doctor's notes for illness, but when this policy was unilaterally and arbitrarily applied to the claimant she complied and provided a doctor's note that clearly excused her absence. Yet, when the claimant presented the note, Mr. Jones refused to speak to her. The claimant had permission to switch shifts. Nothing in this record persuades the administrative law judge that the claimant was quitting her job to move to Las Vegas. The claimant was discharged from her employment for no real reason at all. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The June 2, 2005, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/sc