

**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**

**AMY D FRANKLIN
3400 AGUSTA RD
BURLINGTON IA 52601**

**HUMPHREY HOSPITALITY MGMT INC
SUPERTEL HOSPITALITY MGMT
309 N 5TH ST
PO BOX 1448
NORFOLK NE 68702-1448**

**Appeal Number: 04A-UI-03483-LT
OC 02-15-04 R 04
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the March 19, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 19, 2004. Claimant did participate. Employer did respond to the hearing notice instructions but was not available when the hearing was called and did not participate because the phone was busy twice. Tammy Dowell called in at 2:20 p.m. after the record had been closed and stated she thought the hearing was at 2:45 p.m. She did not provide a good cause reason for her unavailability at the scheduled hearing time and the record was not reopened.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time front desk clerk through February 20, 2004 when she was discharged. Tammy Dowell told claimant she was fired because she looked "like crap" (claimant was sick) when April's (assistant manager) family came in.

On her last date worked, February 16, 2004, claimant requested permission from Dowell and was given permission to go home early because of an ear infection and fever. It was for this reason that claimant did not do her closing duties. During her 7 to 8 month employment, employer provided claimant one uniform shirt. Claimant asked for another and employer promised to order her more shirts when the next order was placed. This was not done. On February 16, claimant was wearing her shirt in preparation for work and her pet urinated on it. She had no other uniform shirts and wore a sweater with a nametag. Employer had allowed claimant to wear a nametag with "Ann" instead of "Amy" as she was concerned about her personal security. At one point, claimant had her shirt untucked because it was too large but generally had it tucked in when customers were present.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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).

Employer's failure to provide a reasonable number of uniform shirts (one is not reasonable even given a part-time schedule) claimant's failure to wear the uniform, especially with pet urine on it, was excusable. Furthermore, looking "like crap" when sick is not a disqualifying offense. Benefits are allowed.

DECISION:

The March 19, 2004, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kjf