

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

JONATHAN A CLIFTON  
176 CARTER ST NW  
CEDAR RAPIDS IA 52405-3202

GMRI INC  
c/o JON-JAY ASSOCIATES INC  
PO BOX 6170  
PEABODY MA 01961

**AMENDED**

Appeal Number: 06A-UI-04679-JTT  
OC: 04/02/06-06 R: 03  
Claimant: Respondent (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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

GMRI (Olive Garden) filed a timely appeal from the April 26, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 17, 2006. Claimant participated. Manager Carrie Bisby represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jonathan Clifton was employed by Olive Garden in Coralville as a full-time server and trainer from July 16, 2004 until March 24, 2006, when Manager Carrie Bisby discharged him for attendance. Mr. Clifton last appeared for work on May 18, 2006, but left early with permission when he told the manager on duty that his 20-month-old child had fallen out of bed, had received injury and

that the child's mother was taking the child to St. Luke's Hospital in Cedar Rapids. Mr. Clifton called the employer later that night to advise that the child was okay, but was not able to keep anything down. On the same evening, the mother of Mr. Clifton's child called the restaurant to inquire whether the employer knew where Mr. Clifton was and informed the employer at that time that Mr. Clifton had earlier left a message instructing her that she was to tell the employer that the child had fallen from the bed and suffered injury if the employer contacted her. Mr. Clifton was absent for his shift on Sunday, March 19 and did not contact the employer until after the shift had ended. On March 21, 22, and 24, Mr. Clifton was absent without notifying the employer. On Sunday, March 26, Mr. Clifton contacted Ms. Bisby. At that time, Mr. Clifton told Ms. Bisby that he had checked himself into drug treatment on Monday, March 20 and had just been released. Mr. Clifton asked whether he still had a job. Ms. Bisby told him that he did not.

The employer's written attendance policy required Mr. Clifton to notify the employer at least two hours before the scheduled start of his shift if he needed to be absent. Mr. Clifton was aware of the policy and signed his acknowledgment of the policy on July 16, 2004.

Mr. Clifton established a claim for benefits that was effective April 2, 2006 and has received benefits totaling \$1,659.00.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Clifton was discharged for misconduct in connection with his employment based on excessive unexcused absences. It does.

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).

Because the claimant was discharged, the employer bears 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).

In order for Mr. Clifton's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Mr. Clifton's testimony was inconsistent with the weight of the evidence and the administrative law judge finds Mr. Clifton's testimony not credible. The weight of the evidence indicates that Mr. Clifton left work early on March 18 under false pretenses. The weight of the evidence indicates that Mr. Clifton was then absent from his shift on March 19 and contacted the employer after the shift had ended. The weight of the evidence indicates that Mr. Clifton was then a "no-call, no-show" for his shifts on March 21, 22, and 24. All of the absences were unexcused under the applicable law. The unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Clifton was discharged for misconduct. Accordingly, Mr. Clifton is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Clifton.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to

the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Since Mr. Clifton received benefits for which he had been deemed ineligible, those benefits constitute an overpayment that Mr. Clifton must repay to Iowa Workforce Development. Mr. Clifton is overpaid \$1,659.00.

If Mr. Clifton is able to provide written documentation from a substance and/or mental health treatment facility that he was an inpatient during the dates in question, he may petition the administrative law judge, prior to the deadline for appeal, to reopen the record and the administrative law judge will reopen the record and consider that documentary evidence.

#### DECISION:

The Agency representative's decision dated April 26, 2006, reference 02, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. Mr. Clifton is overpaid \$1,659.00.

jt/pjs/pjs