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

CARRIE L HERNANDEZ
2913 HICKMAN RD
DES MOINES IA 50310

FIRE MOUNTAIN RESTAURANTS INC
C/O TALX EMPLOYER SERVICES
FORMERLY SHEAKLEY/UNISERVICE INC
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 05A-UI-00283-RT
OC: 06-06-04 R: 02
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 for Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer, Fire Mountain Restaurants, Inc., filed a timely appeal from an unemployment insurance decision dated December 30, 2004, reference 05, allowing unemployment insurance benefits to the claimant, Carrie L. Hernandez. After due notice was issued, a telephone hearing was held on January 25, 2005 with the claimant participating. The employer, Fire Mountain Restaurants, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer appears to be represented by TALX Employer Services, formerly Sheakley Uniservice, Inc., which is well aware of the need to call in a telephone number if the employer wants to participate in the

hearing. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, first as a full-time server becoming part-time in August 2004, from July 1, 2004 until she was discharged on December 9, 2004. The claimant was discharged for poor attendance and in particular an absence on December 9, 2004. On December 8, 2004, the claimant learned that she would have babysitting problems for the next night December 9, 2004. She spoke to Will, an assistant manager, who said that was acceptable and just to tell George, another assistant manager, on December 9, 2004. The claimant called George at approximately 10:00 a.m. on December 9, 2004 and informed him that she was having difficulty obtaining a babysitter. George told the claimant to try and find a babysitter and if not to call him later. The claimant attempted to call George at approximately noon on December 9, 2004 but reached the manager, Ray Alehy. He told the claimant that if she did not find a babysitter and did not come to work she would no longer work for the employer. The claimant was unable to find a babysitter and missed that day and believed that she was discharged. The claimant's shift did not begin until 4:00 p.m. so she had given the employer sufficient notice. The claimant went in on December 12, 2004 to turn in her uniforms to Will. Will thought the claimant was quitting. The claimant informed him that she had been discharged. Will asked her to wait. Will checked with Ray and found out that the claimant had in fact been fired. The claimant had a couple of prior tardies also for a failure to get a babysitter but on each occasion she had notified the employer in advance and her tardies were approved by whomever she informed and she was simply told to come in as soon as she could and she did so. The claimant had no absences. The claimant was adamant that she had received no warnings, either oral or written, for her attendance.

Pursuant to her claim for unemployment insurance benefits filed effective June 6, 2004 and reopened December 5, 2004 and December 19, 2004 the claimant has received unemployment insurance benefits in the amount of $715.00 since separating from the employer on December 9, 2004 as follows: $143.00 per week for five weeks from benefit week ending December 25, 2004 to benefit week ending January 22, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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, (7) provide:

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).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant testified, the administrative law judge concludes, that she was discharged on December 9, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, Excessive unexcused absenteeism and tardies. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence in such a degree of recurrence, any of which would establish disqualifying misconduct. The employer also did not participate in the hearing and provide sufficient evidence of absences and tardies on the part of the claimant that were excessive unexcused absenteeism. The claimant testified that she was absent on December 9, 2004 because she had no babysitter. She informed the employer the night before and was told that it would be ok but to call another assistance

manager. She did so and he suggested that she try to get a babysitter but to call later, implying that her absence would still be ok. When the claimant called back later on December 9, 2004 at noon, four hours before her shift was to start, she talked to the manager who informed her that she was discharged if she did not come to work. The claimant could not come to work and was discharged. The claimant testified that she had two other tardies for babysitting but no absences. The claimant further testified that she always notified the employer of the tardies and the employer approved them and just told the claimant to come in as soon as possible. The claimant was adamant that she never received any warning for attendance, either oral or written. The administrative law judge understands an occasional tardy or absence for babysitting difficulties. Here, the claimant had three. It appears that the claimant properly reported all of these. Under these circumstances, and in the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that the claimant's tardies and absence were for reasonable cause and properly reported and were not excessive unexcused absenteeism and tardies. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $715.00 since separating from the employer herein on or about December 9, 2004 and reopening her claim for benefits effective December 19, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

The employer herein was Fire Mountain Restaurants, Inc. However, the claimant testified that that was the same employer as Ryan's Family Steakhouse. The administrative law judge does not know whether this is true. However, the administrative law judge notes that there is a protest from Ryan's Family Steakhouse pending at reference 08 but no decision has been issued thereon. The employer's number for Ryan's Family Steakhouse is different from the employer's number for the employer herein Fire Mountain Restaurants, Inc., at reference 05. It may be that the employers are the same and that the resolution of the protest for Ryan's Family

Steakhouse may be unnecessary having been previously adjudicated by this decision. The administrative law judge reaches no conclusion on this but simply points that out at this time.

DECISION:

The representative's decision dated December 30, 2004, reference 05, is affirmed. The claimant, Carrie L. Hernandez, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

sc/b