

**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**

**ELENORE B ADKINS  
3304 PUEBLO  
COUNCIL BLUFFS IA 51501**

**SAPP BROTHERS TRUCK STOPS INC  
ATTN – JERI ERICKSEN  
PO BOX 45766  
OMAHA NE 68145-5766**

**JOE BASQUE  
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532 1<sup>ST</sup> AVE #300  
COUNCIL BLUFFS IA 51503**

**Appeal Number: 05A-UI-05422-RT  
OC: 04/24/05 R: 01  
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, 4<sup>th</sup> 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  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Sapp Brothers Truck Stops, Inc., filed a timely appeal from an unemployment insurance decision dated May 12, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Elenore B. Adkins. After due notice was issued, a telephone hearing was held on June 9, 2005, with the claimant participating. The claimant was represented by Joe Basque, attorney at law. Michael Ives, Restaurant Coordinator, participated in the hearing for the employer. Employer's Exhibit One and Two were admitted into evidence. 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 witnesses, and having examined all of the evidence in the record, including Employer's Exhibit One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time server from May of 2001 until she was discharged on April 22, 2005. The claimant was discharged for allegedly failing to perform her duties as a server, including neglecting proper server standards in getting to her tables on time and failing to display displaying a positive attitude and be friendly, and provide efficient service, all arising out of two customer complaints. On, or about, April 17, 2005, the employer received a written customer complaint from Don Teater, complaining about the claimant, as shown at Employer's Exhibit One. On that day, the claimant was very busy. The employer only had two servers to serve the entire area, including two different rooms. The restaurant was full of patrons. Mr. Teater sat at the counter and the claimant served a beverage to Mr. Teater and left a menu. She then had to leave the area and go serve in the other part of the restaurant in another room. The claimant was only gone approximately ten minutes until she returned. Mr. Teater was upset that the claimant had not returned sooner to take an order and he got up and left. He did not order any food. The claimant was doing the best she could at the time. For this complaint, the claimant was discharged on April 22, 2005.

The claimant received a written warning, called an "Employee Record of Counseling," on December 23, 2004, arising out of a complaint from a second customer. The claimant believed that the customer felt that the claimant had not waited on her fast enough, but the claimant did not remember the specifics of this incident. The claimant also received an "Employee Record of Counseling" on December 19, 2003, for failing to follow up with a guest.

Pursuant to her claim for unemployment insurance benefits filed effective April 24, 2005, the claimant has received unemployment insurance benefits in the amount of \$185.00 as follows: \$29.00 for benefit week ending April 30, 2005 (earnings \$68.00) and \$78.00 per week for two weeks, benefit weeks ending May 7 and 14, 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 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 parties agree, and the administrative law judge concludes, that the claimant was discharged on April 22, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. 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's witness, Michael Ives, Restaurant Coordinator, credibly testified, but testified from hearsay. In fact, Mr. Ives had only been the Restaurant Coordinator, working in the restaurant where the claimant was employed, since March of 2004, but the claimant had been employed since May of 2001. The evidence presented by Mr. Ives consisted of two customer complaints.

The most recent complaint was a written complaint on or about April 17, 2005, as shown at Employer's Exhibit One. The claimant credibly testified that she was extremely busy that day because there were only two servers serving the entire restaurant, including two different rooms, and that the restaurant was full. The claimant provided a beverage and the menu to the complaining guest, Don Teater. Then she had to leave to go into the other room and left Mr. Teater to review the menu. The claimant credibly testified that she returned in approximately ten minutes to take the order, but by that time Mr. Teater was mad that she had not returned sooner and left without ordering. The other complaint was, apparently, oral and occurred on or about December 23, 2004, for which the claimant received a written warning called an "Employee Record of Counseling," as shown at Employer's Exhibit Two. This complaint was primarily that the claimant took too long to wait on the customer. The administrative law judge understands an occasional customer complaint for slow service when the claimant is extremely busy. The claimant credibly testified that she was doing the best she could under the circumstances. The administrative law judge concludes that the claimant's

direct testimony outweighs the hearsay evidence of Mr. Ives. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence of any 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 interests and/or in carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. At most, the evidence establishes that the claimant's acts were mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or ordinary negligence in an isolated instance and is not disqualifying misconduct. The administrative law judge notes that during the period that Mr. Ives was the Restaurant Coordinator, since March 2004, the claimant only had two guest complaints. The administrative law judge also notes that, apparently, prior to Mr. Ives, there was only one guest complaint.

In summary, and for all the reasons set out above, 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 insurance 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, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her 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 \$185.00 since separating from the employer herein on or about April 22, 2005, and filing for such benefits effective April 24, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of May 12, 2005, reference 01, is affirmed. The claimant, Elenore B. Adkins, 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 her separation from the employer herein.

kjw/pjs