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

TARA L ZACHMEYER
1822 – 255Th ST
DONNELLSON IA 52625

BENNIGAN'S FORT MADISON
C/O EMPLOYERS UNITY INC
NOW TALX CORPORATION
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 06A-UI-00686-RT
OC: 12-18-05 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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Bennigan's Fort Madison, filed a timely appeal from an unemployment insurance decision dated January 11, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Tara L. Zachmeyer. After due notice was issued, a telephone hearing was held on February 20, 2006, with the claimant participating. Connie Schlichting, Regional Area Director, and Karen Sayre, General Manager, participated in the hearing for the employer. The employer was represented by Diana Perry-Lehr of Employers Unity, Inc., now TALX Corporation. Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department

unemployment insurance records for the claimant. A hearing in this matter was initially scheduled for February 2, 2006 at 2:00 p.m. and rescheduled at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time service manager, from June 25, 2003, until she was discharged on December 21, 2005. The claimant worked at the employer's location in Fort Madison, Iowa. The claimant had been a service manager but was switched to kitchen manager in February of 2005 and then returned to service manager in mid-October of 2005. The claimant was discharged for allegedly not following the expectations of her job function as service manager. The incident that triggered her discharge occurred on December 18, 2005. On that day a "secret shopper" came into the employer's Fort Madison, Iowa, location from 6:00 p.m. to 6:50 p.m. The employer has a "secret shopper" come into each of its stores four times a month to observe operations and file a report. The report of the visit on December 18, 2005, appears at Employer's Exhibit Three. The main problem concerning the claimant was that she was not seen by the "secret shopper" and did not greet every table. The service manager on duty is expected to stop and greet customers at each table. The claimant did not do so at the time of the "secret shopper" because the claimant had left work early at 5:20 p.m. The claimant had had to come to work early that day because of short staff, and the manager on duty at the time suggested that the claimant leave because the employer was not busy. The claimant did so at 5:20 p.m. Nevertheless, after the report of the "secret shopper" the claimant was discharged. The claimant was under the understanding that, if the manager on duty approved, she could leave if she had her job duties completed and the employer was not busy. The claimant had been informed of this by the general manager of the employer's restaurant in Fort Madison, Iowa, Karen Sayre, one of the employer's witnesses.

On November 2, 2005, the claimant received a written warning because she was not greeting customers at each table. On that particular occasion the claimant was busy helping a new bartender and did not have time to go out and greet the customers at every table. On November 28, 2005, the claimant was given a list of manager expectations, as shown at Employer's Exhibit One. All four managers at the employer's location in Fort Madison, Iowa, were given the same expectations. The claimant received these expectations and signed them on November 28, 2005. The claimant received them from the general manager, Karen Sayre. The relevant portions of the expectations that apply to the claimant are number 1, stating that all managers work five ten-hour shifts weekly and that no one leaves a shift early unless approved by the general manager, and number 14, providing that managers visit every table pursuant to "secret shops." The expectations indicate that if they do not occur, an automatic reprimand will be given and a second occurrence could result in termination. The claimant received a copy of the employer's handbook and signed an acknowledgment therefore, as shown at Employer's Exhibit Two. Pursuant to her claim for unemployment insurance benefits filed effective December 18, 2005, the claimant has received unemployment insurance benefits in the amount of $2,696.00 as follows: $337.00 per week for eight weeks from benefit week ending December 31, 2005 to benefit week ending February 18, 2006. For benefit week ending December 24, 2005, the claimant reported sufficient earnings to cancel benefits for that week.

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 December 21, 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 witnesses testified that the claimant was discharged for leaving work early on December 18, 2005, and not being present to greet the customers at all of the tables when a "secret shopper" visited the employer's establishment in Fort Madison, Iowa, where the claimant was employed, and made a report therefore. The report of the "secret shopper" appears at Employer's Exhibit Three.

The claimant had left work early on December 18, 2005, because she had come to work early because the restaurant was short-staffed. The manager on duty who was going to remain on duty after the claimant's shift told the claimant that she could leave if she wished, because she was not busy. The claimant saw to all of her other job duties and then left at 5:20 p.m. The claimant understood that she could leave work early if the manager on duty approved and she had her job duties completed. The claimant conceded that she had received, on November 28, 2005, manager expectations, as shown at Employer's Exhibit One, providing that all managers work five ten-hour shifts weekly and that no one leaves a shift early unless approved by the general manager and further providing that all tables be greeted in regards to "secret shops." This list of manager expectations was given not only to the claimant but all of the other managers at the employer's location in Fort Madison, Iowa. The claimant credibly testified that, despite these manager expectations, she was informed by the general manager, Karen Sayre, at the time she received these expectations that if her work was finished and the employer was not busy and the manager on duty approved, that she could leave work early without calling her. Ms. Sayre conceded that she had informed the claimant and the other employees of this but that it occurred prior to November 28, 2005, and that she did not inform the claimant of this when the claimant received the manager expectations on November 28, 2005. Although it is uncertain exactly what was told to the claimant on November 28, 2005, by Ms. Sayre, it is clear that, previous to that time, Ms. Sayre had permitted managers to leave work early if their work was done and they had permission from the other manager on duty and could leave work early without notifying Ms. Sayre. The administrative law judge concludes that on November 28, 2005, something was said to the claimant suggesting to her at least that this policy or procedure remained in effect. Accordingly, the administrative law judge concludes that the claimant's leaving work early on December 18, 2005, without notifying Ms. Sayre, was not willful or deliberate and therefore was not a deliberate act or omission constituting a material breach of her duties nor did it evince a willful or wanton disregard of the employer's interests and is therefore not disqualifying misconduct for those reasons. It may have been carelessness or negligence on the part of the claimant to leave work early after receiving the list of manager expectations, but the administrative law judge concludes that it was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The evidence establishes that the claimant received a written warning on November 2, 2005, for not visiting the customers at each table, but the claimant had an explanation. The claimant credibly testified that a new bartender was working and that the bartender was very busy and the claimant was busy helping the bartender and did not have time to visit all of the tables. The employer's witness, Connie Schlichting, Regional Area Director, first testified that the manager expectations at Employer's Exhibit One were expectations given to all four managers and were really not in the nature of a warning. Later in her testimony she testified that it was a final warning. The administrative law judge does not believe that the manager expectations were intended to be a final written warning. The manager expectations were given to all of the managers, and the administrative law judge specifically notes that at number 14 the manager expectations state that a first occurrence will result in an automatic reprimand. This does not appear to be a final warning. Ms. Schlichting then testified that the claimant received a verbal warning in December of 2005, but the claimant denied such a verbal warning. The administrative law judge is not convinced that the claimant received such a verbal warning. The

administrative law judge does not understand why the claimant would receive a verbal warning in December of 2005 when she had previously received a written warning on November 2, 2005. Further, this verbal warning further supports the conclusion that the manager expectations on November 28, 2005, was not considered a final warning if the claimant then received a verbal warning in December of 2005. Ms. Schlichting testified that the claimant had received no other warnings or disciplines. Accordingly, the administrative law judge concludes that the claimant's act in leaving work early on December 18, 2005, was not carelessness or negligence in such a degree of recurrence to establish disqualifying misconduct but, at most, was ordinary negligence is an isolated instance or a good-faith error in judgment or discretion and is not disqualifying misconduct.

In summary, and for all of 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.
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> 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 $2,696.00 since separating from the employer herein on or about December 21, 2005, and filing for such benefits effective December 18, 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 January 11, 2006, reference 01, is affirmed. The claimant, Tara L. Zachmeyer, 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.

kkf/kjw