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

JAMES BERGER
2111 MULBERRY ST
WATERLOO IA 50703-5107

FLYING J INC
C/O UNEMPLOYMENT SERVICES LLC
PO BOX 749
ARVADA CO 80006-9000

Appeal Number: 06A-UI-07731-ET
OC: 07-02-06 R: 03
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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 26, 2006, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 16, 2006. The claimant participated in the hearing. Anita Manifold, General Manager and Carol Weidinger, Employer Representative, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time buffet attendant for Flying J Inc. from September 5, 2005 to June 20, 2006. The employer's business is open 365 days per year and at the time of hire employees are told they would be expected to work the holidays that fell on their normally scheduled workdays. The employer's policy also requires employees to call in at least four hours before the start of their shift if they are going to be absent and states that a no-call no-show would be grounds for termination. The claimant threatened to quit because he was scheduled to work Thanksgiving and Christmas but the employer made arrangements for him to come in later and the claimant accepted those terms. The employer also allowed him to come in three hours late on Easter. On Mothers Day, May 14, 2006, the claimant called one hour before the start of his shift and said he would not be in because he was having difficulty with his medication. The employer prepared a final written warning May 23, 2006, citing the no-call no-show May 14, 2006, but the claimant did not sign the warning and the warning does not indicate "refused to sign." The claimant denies ever receiving a warning. On June 17, 2006, the claimant called the employer and spoke to Brenda, the second shift manager, and told her his girlfriend was having surgery Monday, June 19, 2006, and he wanted to trade shifts with someone for Monday. He was able to find someone to trade with and then told Brenda he would not be in Sunday, June 18, 2006, which was Fathers Day, because he wanted to stay with his girlfriend. The employer contends the claimant did trade shifts with another employee for Monday but did not tell anyone he would not be in Sunday. The employer terminated his employment for being a no-call no-show June 18, 2006.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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 proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). While there is no doubt that the claimant seemed to avoid working on holidays and the fact his absences occurred on holidays is not coincidental, the evidence does not establish that he received the written warning May 23, 2006, or that he did not call and tell Brenda he would not be in June 18, 2006. Because the warning did not contain the claimant's signature or a "refused to sign" notation, it cannot be assumed he received the warning that would have told him his job was in jeopardy. Additionally, while he may not have told Brenda he would not be in June 18, 2006, Brenda did not participate in the hearing and therefore the administrative law judge must accept the claimant's first-hand testimony that he did call and was told he could have June 18, 2006, off work. Consequently, while not finding the claimant's testimony particularly credible, the administrative law judge must conclude that the employer has not met its burden of proving disqualifying job misconduct as defined by Iowa law. Benefits are allowed.

DECISION:

The July 26, 2006, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/pjs