

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

MISSI PETRY
APT 3
201 E 16TH CT
DES MOINES IA 50316-3961

FLYING J INC
c/o TALX EMPLOYER SERVICES
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 06A-UI-02872-DT
OC: 02/05/06 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

STATEMENT OF THE CASE:

Flying J, Inc. (employer) appealed a representative's February 27, 2006 decision (reference 01) that concluded Missi Petry (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 30, 2006. The claimant participated in the hearing. Sandy Fitch of TALX Employer Services, formerly Employer's Unity, appeared on the employer's behalf and presented testimony from one witness, Greg Spurgen. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 3, 2005. She worked full time as a cashier in the employer's Clive, Iowa, truck stop, normally on shifts that began at either 6:00 a.m. or 8:00 a.m. Her last day of work was February 7, 2006. The employer discharged her on that date. The reason asserted for the discharge was being a no-call/no-show for her 6:00 a.m. to 2:00 p.m. shift on February 6, 2006.

The claimant had missed a number of days in January, primarily due to hospitalization of her father. There was one absence related to a personal injury, and at least one tardy due to car problems. Some of the occurrences were no-call/no-shows. She was warned that any more no-call/no-shows without a doctor's excuse would result in discharge.

On the evening of February 5, 2006, the claimant called the employer to report that she would not be able to be at work the next day, because she had no transportation. She was told by an assistant manager that she needed to find a replacement or come to work. She reported back that she had tried the other employees but that no one was available to either work for her or give her a ride.

The claimant did not report for work on February 6, and the employer treated the absence as a no-call/no-show. As a result, it discharged the claimant on February 7, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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).

871 IAC 24.32(7) provides:

(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.

Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer treated the claimant's February 6, 2006, absence as a no-call/no-show, which it had previously warned her must be documented with a doctor's excuse to avoid discharge. However, the absence was not a no-call/no-show – the claimant had informed the employer the prior day that she would not be at work on February 6. While the absence on February 6 may not itself have been excused as due to an issue that is of purely personal responsibility, it had been reported to the employer in advance and was not the type of absence for which the claimant was warned she might be discharged. Higgins, supra.; Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 27, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/kkf