

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

CARY K CORRELL
115 E CLARK
CLARINDA IA 51632

HY-VEE INC
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HY-VEE INC
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3799 VILLAGE RUN DR #511
DES MOINES IA 50317

Appeal Number: 05A-UI-11625-RT
OC: 10-23-05 R: 01
Claimant: Appellant (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

STATEMENT OF THE CASE:

The claimant, Cary K. Correll, filed a timely appeal from an unemployment insurance decision dated November 4, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on December 1, 2005, with the claimant participating. Milton Correll, the claimant's husband, and Charles Warner, the claimant's father, testified for the claimant. Dan Fuller, Store Director at the employer's store in Clarinda, Iowa, where the claimant was employed, and Cindy Wolhoy, Scanning Coordinator, participated in the hearing for the employer. The employer was represented by David Williams of TALX UCM Services, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department of 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, the administrative law judge finds: The claimant was employed by the employer as a part-time bakery fryer from January 3, 2000 until she was discharged on October 20, 2005. The claimant averaged between 25 and 40 hours per week. The claimant was discharged for coming to work intoxicated and smelling of alcohol. The employer has a policy, number 19 in its policy manual, for which the claimant signed an acknowledgement, prohibiting the use of drugs or alcohol or being under the influence of alcohol or drugs and prohibiting an employee who has been drinking or using drugs from reporting to work for a reasonable time. The policy further provides for discharge upon a violation. This policy is also referred to in the employer's handbook, a copy of which the claimant received. On October 20, 2005, the claimant drank three beers between 10:00 a.m. and 1:30 p.m. The claimant was supposed to start work at 2:00 p.m. but she arrived about five minutes late. The claimant had a strong odor of alcohol on her breath and slurred her speech and she had difficulty in walking up steps. The claimant was also loud and using profanity. The claimant was confronted by the employer's witness, Dan Fuller, Store Director of the employer's store in Clarinda, Iowa, where the claimant was employed, and the claimant admitted to him that she had been drinking and she had been drinking "enough" or "plenty." Mr. Fuller offered the claimant assistance if she had a drinking problem, but the claimant refused. The claimant was then discharged. Previously, in September or October of 2005 the claimant was unable to come to work because she was intoxicated and had been drinking and called and notified the bakery manager. When the claimant did come to work thereafter the bakery manager warned the claimant not to do that again and to watch out. The claimant does suffer from cerebral palsy and has some difficulty in speaking and walking.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 October 20, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's two witnesses credibly testified that on October 20, 2005, the claimant came to work with alcohol on her breath and slurring her speech and having difficulty in walking up steps and was loud and using profanity. The claimant conceded that she had drank three beers between 10:00 a.m. and 1:30 p.m. when she was supposed to start work at 2:00 p.m. The claimant's witness, Milton Correll, the claimant's husband, testified that the claimant smelled of alcohol at 2:30 p.m. when he got home. On the record here, the administrative law judge is constrained to conclude that the claimant drank at least three beers immediately prior to going to work at 2:00 p.m. and that she was intoxicated when she went to work. The claimant did suffer from cerebral palsy and the cerebral palsy caused the claimant some speech difficulties and walking difficulties. However, cerebral palsy will not account for the alcohol smell on the claimant's breath or the loud and profane language used by the claimant. The employer has a policy, number 19, in its policy manual prohibiting such behavior. The claimant signed an acknowledgment of the policy manual. The claimant's testimony that she was not aware that the employer prohibited coming to work intoxicated and with alcohol on her breath is simply not credible. Even assuming that the claimant was fully unaware of this policy, the claimant conceded that she knew it was not appropriate and the administrative law judge strongly agrees that coming to work intoxicated after drinking three beers and with alcohol on her breath is inappropriate behavior. Just a few weeks before, the claimant had had to miss work because she was too intoxicated to come to work and when she did return to work thereafter she was warned about this behavior. Accordingly, the administrative law judge concludes that claimant's actions in coming to work on October 20, 2005 after drinking three beers and being intoxicated and having alcohol on her breath was a deliberate act constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interest and is, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge notes that when the claimant was confronted by the employer's witness, Dan Fuller, Store Director of the employer's store in Clarinda, Iowa, where the claimant was employed, Mr. Fuller offered to provide the claimant assistance if she had a drinking problem but the claimant refused. The administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a

consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she requalifies for such benefits.

DECISION:

The representative's decision of November 4, 2005, reference 01, is affirmed. The claimant, Cary K. Correll, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct.

kkf/kjw