

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

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Appeal Number: 06A-UI-03074-LT  
OC: 02-05-06 R: 02  
Claimant: Appellant (2)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the March 8, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 5, 2006. Claimant participated. Employer did not participate.

The employer's representative called after the hearing record had been closed and indicated a trainee had claimed to have called the Appeals Section but did not obtain a control number. After a review of the call logs, no record of employer or employer's representative having called the Appeals Section in response to the hearing notice instructions was found. The record was not reopened.

#### FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. The employer's representative failed to provide a telephone number at which a representative could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer's agent was the party responsible for not making the employer available to participate, not the Agency or postal service or any type of emergency situation. This is not a good cause reason for reopening the record. The employer is bound by its agent's actions.

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time sales manager through February 1, 2006 when he was discharged. On January 31 claimant was the only employee present and there were three or four people in line and claimant did not ask for identification of an individual purchasing alcohol and entered "99" on the cash register to exit out of the age identification screen as he had been trained to do if busy. The customer was a minor and claimant was ticketed for the sale. Claimant had never sold alcohol to a minor before and had not been advised his job was in jeopardy for any reason. Manager, Tina, told claimant not to worry about it and since he had not gone through state training classes, she would help him through the process. Employer is inconsistent in its application of discipline and does not fire all employees for a first violation of selling to a minor.

#### REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the appellant's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Inasmuch as the employer is bound by its agent's actions, no good cause reason has been established to reopen the record because of the agent's failure to provide a number at which to reach the employer. Therefore, the employer's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes 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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

While the conduct may have warranted discharge according to employer's expectations, since employer allows this default procedure and disciplines its employees disparately it has not established evidence of wrongful intent or a pattern of negligence and claimant's conduct did not rise to the level of disqualification. Benefits are allowed.

DECISION:

The March 8, 2006, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kkf