

**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**

**SHELLY M PETERSON  
135 S STEVENS  
IOWA FALLS IA 50126**

**PORTER BROS ENTERPRISES LC  
PORTERS ON MAIN  
205 MAIN ST  
IOWA FALLS IA 50126**

**LYNN WIESE  
ATTORNEY AT LAW  
PO BOX 834  
IOWA FALLS IA 50126**

**Appeal Number: 05A-UI-03996-D  
OC: 03/13/05 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, 4<sup>th</sup> 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)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Porter Brothers Enterprises, L.C. (claimant) appealed a representative's April 7, 2005 decision (reference 01) that concluded Shelly M. Peterson (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, an in-person hearing was held on May 26, 2005. The claimant participated in the hearing. Lynn Wiese, attorney at law, appeared on the employer's behalf and presented testimony from one witness, Doug Porter. 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 October 12, 2003. She worked part time (approximately 28 – 32 hours per week) as a bartender in the employer's restaurant. Her last day of work was March 2, 2005.

The claimant was next scheduled to work starting at 4:30 p.m. on March 3, 2005. However, the claimant was arrested at approximately 1:30 a.m. that morning in a dispute regarding the moving of her cousin's car without permission. She had been told she would be able to be released after seeing a judge at approximately 8:30 a.m. that morning, but because of other court delays, it was approximately 1:30 p.m. when she appeared before the judge. She was then allowed to be released upon the posting of a \$950.00 bond. However, she also had to be taken from Hampton, Iowa to Eldora, Iowa for processing. The claimant used her one phone call to contact a friend to see about getting bond money and to have the friend notify the employer that she would not be in for her 4:30 p.m. shift. The claimant had considered checking with one of the other bartenders at the restaurant to see if they were available to substitute for her, but had concluded that it was too short notice to find anyone. The friend contacted Mr. Porter, the owner/operator, at approximately 3:45 p.m. and relayed the claimant's message that she would not be in.

The employer expected employees to find their own replacements if they were going to be absent. Since in this case the claimant did not find her own replacement, Mr. Porter determined to permanently replace her on the schedule. The claimant did contact him after she was released from custody and returned home later the evening of March 22 at approximately 8:00 p.m., and he told her that she did not have a job, that all of her hours had been replaced. The claimant had not previously had any absences for which she had not found replacements; those absences were therefore considered excused.

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. This was the claimant's first unexcused absence. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Even though the employer was fully within its rights to discharge the claimant for a single unexcused absence under its attendance policy, the employer has not established excessive unexcused absenteeism as necessary to be considered misconduct for purposes of unemployment insurance disqualification. Cosper, supra. 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 April 7, 2005 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/pjs