

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

TANIA L MCDANNEL
Claimant

APPEAL NO. 12A-UI-03092-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NELLIS MANAGEMENT COMPANY
Employer

**OC: 05/15/11
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated March 13, 2012, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on April 11, 2012. The claimant participated. Participating as witnesses for the claimant were Heather Smith, Sharon Cron and Stacy Martinez. The employer participated by Alica Arpy, Store Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Tania McDannel was employed by the captioned employer, doing business as Long John Silver from April 8, 2008 until September 21, 2011 when she was discharged for repetitive excessive tardiness. Ms. McDannel was employed as a part-time cashier and was paid by the hour. The claimant's immediate supervisor was Alica Arpy.

The claimant was discharged when she reported to work approximately 25 minutes late on September 17, 2011. The claimant had a history of poor punctuality and had been specifically warned by the employer on August 15, 2011 that further instances of tardiness or failure to report without notification would result in her termination from employment. (See Employer's Exhibit Four).

Although the claimant was considered to be an excellent worker in other respects, the claimant's repetitive tardiness was considered to be contrary to the employer's interests and setting a bad example for other workers. When the tardiness continued after warning a decision was made to terminate Ms. McDannel from her employment.

It is the claimant's position that although warned she did not believe that she would be discharged if she continued to be tardy. It is the claimant's further position that she believes that her discharge was motivated by personal reasons on behalf of her supervisor.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the employer has sustained its burden of proof in establishing that the claimant was discharged under disqualifying conditions. It has.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of job misconduct. The Court held that it must be both excessive and unexcused and that the concept included tardiness, leaving early, etcetera.

Although sympathetic to the claimant's situation the administrative law judge must conclude based upon the evidence in the record that the claimant had been excessively tardy and had been reasonably warned before being discharged when she again reported late for work on or about September 17, 2011. The claimant's repetitive tardiness after being warned showed a disregard for the employer's interests and standards of behavior and was disqualifying under the provisions of the Employment Security Law.

DECISION:

The representative's decision dated March 13, 2012, reference 01, is affirmed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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