

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

JOHN J CLARK
2725 NE 53RD CT
DES MOINES IA 50317

DRAKE DINER LLC
DRAKE DINER
5700 INGERSOL AVE
DES MOINES IA 50312

Appeal Number: 04A-UI-04498-H2T
OC 03-28-04 R 02
Claimant: Respondent (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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 12, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 2, 2004. The claimant did participate. The employer did participate through Steve Vilmain, Owner.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a bartender/waiter full time beginning September 4, 1997 through March 28, 2004 when he was discharged.

The claimant was discharged on March 28, 2004 after a table of regular customers complained that the claimant had been rude to them while waiting on them. The customers told the Manager Jody Valentine that the claimant had spilled hot coffee on the table and never wiped up the spilled coffee or apologized for spilling it. The claimant also failed to bring them silverware that was needed to eat their dinner. On that same day, Ms. Valentine witnessed the claimant yell at a customer who was sitting at the counter and had asked for his change. After seeing the claimant yell at the customer, Ms. Valentine immediately excused the claimant from working any other tables and later that evening after his shift was over she told him that he was discharged for being rude to customers.

The claimant had been previously disciplined for treating customers and coworkers in a rude or disrespectful manner including an occasion in October 2003 where he was swearing and cursing at the counter loud enough for customers to hear. The claimant had also been previously disciplined for telling a manager to "fuck off."

The claimant admits that on February 29, 2004 after another complaint about the claimant being rude; Ms. Valentine warned the claimant that he would be terminated if another complaint were received about his rudeness. Ms. Valentine actually witnessed the claimant yell at a customer who had asked for his change on March 28, 2004.

On most occasions the claimant was not rude and was able to meet the employer's expectations.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 claimant indicated on most occasions that he was able to perform up to the employer's expectations, indicating that this was not impossible for the claimant to perform the job.

The employer has established that the claimant was rude to customers on March 28, 2004. He had been previously warned about similar conduct and behavior and that his job was in jeopardy. The employer's business is dependent upon customers having a pleasant experience and returning for repeat visits. The claimant's actions directly impacted the employer's business when he was rude to customers. An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's rights by repeatedly being rude to customers and using profanity in the restaurant after being warned that such behavior would result in the loss of his job. The claimant's disregard of the employer's rights and interests is misconduct. As such, the claimant is not eligible to receive unemployment insurance benefits. Benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The April 12, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,254.00.

tkh/kjf