

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHRYN L OCONNOR
Claimant

APPEAL NO. 070-UI-09895-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CY CORPORATION
Employer

**OC: 07/22/07 R: 02
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kathryn O'Connor (claimant) appealed a representative's August 22, 2007 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Cy Corporation (employer) for misconduct. A hearing was held on November 29, 2007, following due notice pursuant to Remand Order of the Employment Appeal Board dated October 24, 2007. The claimant participated personally and through her sister, Linda Huss, and her friend, Sandra Kuhns. The employer participated by Si Scales, Owner; Kimberly Cresta, Manager of Marketing and Events and Owner's Daughter; Boris Majstorivic, Customer, and Ekrem Samardzic, Customer. Zijo Sucasca was the interpreter for Ekrem Samardzic.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired in November 2006, as a full-time bartender. The employer rehired the claimant after she had issues with alcohol. She was off work for five weeks in June of 2007 due to a leg injury. The owner had a policy that employees who were absent had to contact him personally. She or her sister kept in contact almost daily with the owner while she was off work. The claimant returned to work on June 15, 2007. Based on her doctor's recommendation, she only worked 20 hours each week for the first two weeks after she returned. She resumed full-time work on or about July 1, 2007.

Her last day of work ended in the early morning hours of July 11, 2007. The claimant started drinking that evening. She allowed Mr. Samardzic to buy her shots. Mr. Majstorivic noticed she was drinking clear liquid. Prior to closing time she telephoned the owner as required to report the amount of money taken in and any other matters of interest. She left at the same time as Mr. Samardzic and Mr. Majstorivic. Mr. Samardzic noticed the claimant's words were slurred. The claimant could not remember where she or her sister lived and she needed help.

Mr. Majstorivic took her home to his house. The claimant told him that she started drinking again.

On July 12, 2007, Mr. Majstorivic drove the claimant to her sister's house. By this time the claimant did not appear intoxicated. At 1:46 p.m. on July 12, 2007, the claimant's sister left a voice message for Ms. Cresta, the owner's daughter. Ms. Cresta eventually talked to the claimant and her sister and discovered the claimant was in the hospital for issues with the claimant's leg. The claimant nor her sister told Ms. Cresta that her leg was twisted while working on July 11, 2007. The claimant wanted Ms. Cresta to work her hours for her since the claimant had to stay in the hospital for five days. Ms. Cresta was busy, frustrated by the claimant's absences and could not work the claimant's hours. She told the claimant "Between you and me, I need someone who is dependable and not overweight". The claimant was offended by Ms. Cresta's comments and thought she had been terminated. The claimant never contacted the employer.

On or about July 13, 2007, Ms. Cresta told her father the claimant was in the hospital. The employer did not understand why the claimant did not properly report this to him but expected her to return to work on July 17, 2007. On July 13, 2007, the employer learned the claimant was drinking while on duty on July 11, 2007. When the claimant did not appear for work or notify him personally of her absence from July 12 through July 19, 2007, the employer decided to terminate the claimant. He left messages asking for her keys and indicating he had her final paycheck.

REASONING AND CONCLUSIONS OF LAW:

For the following reasons the administrative law judge find the claimant was discharged for 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was an improperly reported illness which occurred from July 12 through 19, 2007. The claimant's absence does amount to job misconduct because it was not properly reported. The claimant was discharged for misconduct. She is not eligible to receive unemployment insurance benefits.

DECISION:

The representative's August 22, 2007 decision (reference 01) is affirmed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs