

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

KARA L SCHILLING
1000 CEDAR ST
CHARLES CITY IA 50616-3528

MCSOIFERS INC
1010 S GRAND AVE
CHARLES CITY IA 50616

Appeal Number: 06A-UI-01346-HT
OC: 01/08/06 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
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, McSoifer's, filed an appeal from a decision dated February 1, 2006, reference 01. The decision allowed benefits to the claimant, Kara Schilling. After due notice was issued a hearing was held by telephone conference call on February 21, 2006. The claimant did not provide a telephone number where she could be contacted and did not participate. The employer participated by Owner Sam Soifer.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Kara Schilling was employed by McSoifer's from June 17 until December 6, 2005, as a part-time crew member.

On Sunday, November 27, 2005, the claimant was scheduled to work 6:00 a.m. until 2:00 p.m. but was a no-call/no-show. Manager Scott Soifer questioned her when she arrived for her next scheduled shift on November 29, 2005. She said she had mis-read the schedule and did not think she had to work that day. Mr. Soifer had previously given her verbal counselings for being tardy, but this was the first no-call/no-show, and he decided to "give her the benefit of the doubt." However, he did advise her that she could be fired if she missed any other scheduled shift.

On Sunday, December 4, 2005, the claimant was again scheduled to work 6:00 a.m. until 2:00 p.m. when she called in around 5:00 a.m. to report she would be absent. When Mr. Soifer arrived at 5:45 a.m. he was told of the call-in and contacted Ms. Schilling by phone. He said the store really needed her that day and she was supposed to work and she stated she would be in. However, she did not report for the remainder of the shift nor did she call in.

She arrived for work on December 5, 2005, but without a uniform. The assistant manager she could not work without a uniform and was to speak with the manager before she returned to work. When she came to work on December 6, 2005, Mr. Soifer asked why she had not come in on Sunday even though she said she would. Ms. Schilling merely indicated she did not feel she should have to be there. When she was told she was discharged she became verbally abusive and called the manager a "fucking bastard" and an "ass."

Kara Schilling has received unemployment benefits since filing a claim with an effective date of January 8, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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.

The claimant had been advised her job was in jeopardy as a result of her tardiness and absenteeism. Even though she called in absent on December 12, 2005, she later agreed to come in and work her scheduled shift, but did not do so. This must be considered an unexcused absence regardless of the reason. She deliberately misled the employer to believe she would report for her shift when she apparently had no intention of doing so. This is a final incident of unexcused absence which, in conjunction with the other attendance problems, constitutes excessive unexcused absenteeism. Under the provisions of the above Administrative Code section this conduct not in the best interests of the employer and the claimant is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of February 1, 2006, reference 01, is reversed. Kara Schilling is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$123.00.

bgh/s