

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA CORY
Claimant

APPEAL NO: 07A-UI-00247-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CLAXONS SMOKEHOUSE & GRILL
Employer

**OC: 11-19-06 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 28, 2006, reference 01 decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 24, 2007. The claimant did not respond to the hearing notice and did not participate in the hearing. Andy McReynolds, Owner, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time bartender/waitress for Claxon's Smokehouse & Grill from May 2004 to May 30, 2006. She was discharged for poor attendance and insubordination. The claimant either left early or was late six times before she was demoted from a management position May 5, 2006. The employer gave her a strenuous verbal warning and advised her that her job was in jeopardy if the attendance problems continued. The claimant was late May 8, 2006, and left work early May 12, 2006. She arrived late on both May 20 and May 24, 2006, and then left after working less than two hours. The employer took the claimant off the schedule for three days ending May 29, 2006, and advised the claimant no more incidents of tardiness or leaving early would be tolerated. The claimant was 45 minutes late May 30, 2006, and when she called the employer, she said she was tired of listening to his "fucking shit" and did not know if she wanted to come in. She asked the employer if he wanted her to come in and he said "Yes, 45 minutes ago. Get in here now." The claimant reported to work and was discharged at the end of her shift.

The claimant filed a claim for unemployment insurance benefits after her separation from this employer but has not received any benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for insubordination and poor attendance. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Id. The claimant had received multiple warnings and a demotion but continued to have problems with her attendance. On the final day, when she was late, she became belligerent with the employer and was subsequently discharged. The claimant's conduct was a willful and material breach of her duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. The employer has established work-related misconduct as defined by Iowa law and benefits are denied.

DECISION:

The December 28, 2006, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. There is no overpayment as a result of this decision.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs