

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

ROBBIN R HILL
3211 MOUND AVE SE
CEDAR RAPIDS IA 52403-3145

CARLOS O'KELLY'S INC
1877 N ROCK RD
WICHITA KS 67206-1260

Appeal Number: 06A-UI-04440-DT
OC: 03/26/06 R: 03
Claimant: Appellant (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

STATEMENT OF THE CASE:

Robbin R. Hill (claimant) appealed a representative's April 14, 2006 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Carlos O'Kelly's, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 10, 2006. The claimant participated in the hearing. Mike Cabellero appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer from 1986 to July 2000, the claimant most recently began working for the employer on August 28, 2000. Since approximately 2003, she worked full time as hospitality manager at the employer's Cedar Rapids, Iowa restaurant. Her last day of work was March 27, 2006. The employer discharged her on that date. The reason asserted for the discharge was abusive behavior toward employees and customers.

On March 20 a customer was in the restaurant with a child who was misbehaving; the customer asked her waitress to have her meal boxed to go and asked that some additional chips be added to her box. The waitress informed the customer that there would be an additional charge of \$.50 or \$1.00. The customer became upset with the waitress and started screaming at the waitress. Another manager came to the customer's table and affirmed that charging for the additional chips was necessary. The customer continued screaming at the other manager. The other manager made the decision to call the police given the customer's behavior and a concern that the customer had been drinking. She walked to the bar and told the bartender to call the police, and then went to the back office where the claimant was working and told her what was going on; the claimant had not been able to hear the commotion from her office.

As senior manager on duty, the claimant then went to the customer's table and asked if there was anything she could do to solve the problem. The customer said that it was too late, she was just going to keep yelling. The claimant waited at the table for the next few minutes until the police arrived. The police escorted the customer off the premises and the claimant waived payment for her meal. The customer later told Mr. Cabellero that the claimant had been rude.

Mr. Cabellero felt that the claimant did not take appropriate action to prevent the situation from escalating. The claimant had been given prior warnings about concerns about her treatment of personnel and the need to create a positive work environment.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the assertion she did not properly deal with the customer on March 20, 2006. However, the claimant's first-hand testimony demonstrates that she did not even have an opportunity to diffuse the situation before it escalated, and that her actions were appropriate to the situation. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the

claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's April 14, 2006 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/kkf