

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

Appeal Number: 04A-UI-11491-DT  
OC: 09/26/04 R: 02  
Claimant: Respondent (4)

**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, 4<sup>th</sup> 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.

FRED E COOK  
#808  
8626 WESTOWN PKWY  
WEST DES MOINES IA 50265

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.

NPC INTERNATIONAL INC  
PIZZA HUT  
c/o JON-JAY ASSOCIATES INC  
PO BOX 182523  
COLUMBUS OH 43218-2523

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Pizza Hut (employer) appealed a representative's October 14, 2004 decision (reference 01) that concluded Fred E. Cook (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 17, 2004. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Paul Westgate appeared on the employer's behalf and presented testimony from one other witness, Ben Spike. 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.

#### FINDINGS OF FACT:

The claimant started working for the employer on August 14, 2003. He worked full time as a cook/server and shift manager trainee in the employer's Ames, Iowa, restaurant. His last day of work was January 16, 2004. The employer discharged him on January 17, 2004. The reason asserted for the discharge was attendance.

On December 5, the claimant had been a no-call/no-show for work and had been warned that another incident could result in discharge. He had also been given a final warning for tardiness on December 10, 2003. On January 17, 2004 the claimant was scheduled for a training shift at 8:00 a.m. for which he was a no-call/no-show. He was scheduled for a regular shift at 5:00 p.m. When he sought to report for that shift, he indicated that he had overslept and missed the 8:00 a.m. training shift. He was then discharged.

The claimant established an unemployment insurance benefit year effective September 26, 2004. His weekly benefit amount was calculated to be \$149.00. Agency records indicate that after January 17, 2004 the claimant earned more than \$1,490.00 in insured wages from other employers.

#### REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but 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 decisions. 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 section 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, (7) provide:

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).

(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's final absence was not excused and was not due to illness or other reasonable grounds. The presumption is that oversleeping is generally within an employee's control. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had previously been warned that future absences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The administrative record indicates the claimant obtained employment after working for the employer and earned more than ten times his weekly benefit from subsequent employment. Therefore, the outcome of this decision has no legal effect upon the claimant.

#### DECISION:

The representative's October 14, 2004 decision (reference 01) is modified in favor of the employer. The employer discharged the claimant for disqualifying reasons. The claimant would be disqualified from receiving unemployment insurance benefits as of January 17, 2004. Since January 17, 2004, the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, and so is eligible to receive benefits as of September 26, 2004, provided he is otherwise eligible. The employer's account will not be charged.

ld/tjc