

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

MICHAEL V DRISH
4707 POMMEL PL
WEST DES MOINES IA 50265

AFTER HOURS FORMALWEAR INC
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-03376-CT
OC: 02/13/05 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 for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

After Hours Formalwear, Inc. filed an appeal from a representative's decision dated March 23, 2005, reference 03, which held that no disqualification would be imposed regarding Michael Drish's separation from employment. After due notice was issued, a hearing was held by telephone on April 20, 2005. Mr. Drish participated personally. The employer participated by Cory McNeley, Loss Prevention Manager, and Ed Kulzack, Regional Vice President.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Drish was employed by After Hours Formalwear, Inc. from June 7, 2004 until January 28, 2005 as a full-time store manager. On or about January 20, 2005, the employer discovered that Mr. Drish had not been clocking in and out as required. Employees, including management, are required to clock in and out at the beginning and end of the work shift as well as before and after lunch breaks. The employer discovered that Mr. Drish had failed to clock in and/or out on 40 occasions beginning in November of 2004. On January 27, 2005, Cory McNeley met with Mr. Drish and gave him a verbal warning about clocking in and out. Mr. McNeley left the store and, when he returned later that day, he discovered that Mr. Drish had left for at least 30 minutes without clocking out. When questioned, Mr. Drish indicated he had run a personal errand to a mortgage company because he was buying a house. He was discharged for violating the employer's policy immediately following the verbal warning.

In making the decision to discharge, the employer also considered the fact that Mr. Drish was smoking on the premises in a back area of the store. There is a sign posted in the area advising employees that smoking is prohibited. The store is located within Valley West Mall, which is a no-smoking facility.

Mr. Drish has been paid a total of \$3,220.00 in job insurance benefits since filing his claim effective February 13, 2005.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Drish was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Drish was discharged for smoking in an unauthorized area and for not clocking in and out as required. His conduct in not clocking in and out is sufficient, standing alone, to establish misconduct. Mr. Drish was verbally warned on January 27 that his failure to clock in and out was not acceptable. In spite of the warning, he again violated the policy the same day. He did not leave the store for any work-related purpose. He told the employer he had gone to a mortgage company because he was purchasing a house. During the hearing, he indicated he had gone to the mortgage company to deliver an application for employment to a person employed there. The statement he gave the employer is more credible. Moreover, it was not a reasonable expectation that his job duties would include delivering work applications to people interested in applying for work.

It appears that Mr. Drish left work on January 27 without clocking out because he did not anticipate that Mr. McNeley would be returning to the store that afternoon. His failure to clock out when he ran a personal errand constituted a flagrant disregard of the standards he had been warned about earlier in the day. An employer has the right to expect that employees will devote their full efforts to work activities while on the clock. An individual's time can only be monitored if it is accurately reported. As a manager, it was Mr. Drish's responsibility to set the standard for those working under him. This means that he had a higher obligation to abide by reasonable policies. For the reason stated herein, it is concluded that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

Mr. Drish has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated March 23, 2005, reference 03, is hereby reversed. Mr. Drish was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Drish has been overpaid \$3,220.00 in job insurance benefits.

cfc/pjs