

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

MARY A KIERNAN
625 E LOCUST ST APT 3
DAVENPORT IA 52803

INTERSTATE BRANDS CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-04295-RT
OC: 03-14-04 R: 04
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 Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Interstate Brands Corporation, filed a timely appeal from an unemployment insurance decision dated April 5, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Mary A. Kiernan. After due notice was issued, a telephone hearing was held on May 7, 2004 with the claimant participating. Kelly Green, Human Resources Assistant, participated in the hearing for the employer. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time thrift store clerk from April 23, 2002 until she was discharged on March 17, 2004. The claimant was discharged for poor job performance and poor attendance. On March 17, 2004, the claimant was tardy one and one-half hours to work even though she was to open the store. The store was not opened on time and this was discovered by the Brinks truck that was to make a stop at the employer's store. The claimant was tardy because she had overslept because her alarm clock did not go off. This was the final straw and the claimant was discharged. The claimant also had the following tardies and absences: March 2, 2004, a tardy but no testimony as to why; February 10, 2004, absence but no testimony as to why; January 24, 2004, a tardy but no testimony as to why; an absence on November 7, 2003 for family issues; a tardy on November 1, 2003 for one hour but there was no testimony as to why; and an absence on October 9, 2003 for personal illness. Aside from the tardy on March 17, 2004, all of the other claimant's tardies and absences were properly reported to the employer.

The claimant received a number of warnings for her attendance as follows: October 13, 2003, an oral warning; November 1, 2003, an oral warning; November 10, 2003, a written warning; January 24, 2004, an oral warning; February 10, 2004, a written warning; and March 2, 2004, a written warning. In addition, the claimant received a warning on August 3, 2003 because she was late in opening the store and also a warning on February 1, 2003 because she was late in opening the store.

The claimant was also discharged for performance issues. On August 8, 2003 the claimant was given an oral warning for leaving the safe unlocked and a written warning on October 12, 2003 for the same reason. On one occasion the claimant had not opened the safe. On March 15, 2004, the claimant would have received an oral warning for consuming a soft drink beverage from the employer without paying for it. However, before the warning or suspension could be assigned to the claimant, she was discharged for the tardy as noted above. When the claimant came to work on March 15, 2004, she grabbed a bottle of soft drink and did not pay for it thinking that she already had a bottle in the refrigerator for which she had paid and she was going to switch the two. However when the claimant placed it in the refrigerator she realized that her other bottle was not there and was going to pay for it but then forgot about it and never did pay for the pop.

Pursuant to her claim for unemployment insurance benefits filed effective March 14, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,488.00 as follows: \$186.00 per week for eight weeks from benefit week ending March 20, 2004 to benefit week ending May 8, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. 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.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). In the last five months of the claimant's employment she was tardy on four occasions and absent on three occasions as set out in the findings of fact. The claimant did not properly report the last tardy and conceded that that was for oversleeping and caused her to be late in opening the store. The claimant testified that she properly reported all of the other tardies and absences. However, the claimant had no explanation for any of the

tardies and for one of the absences. The claimant also received six warnings for her attendance in the last five months of her employment, three of which were oral and three of which were written. On the strength of the evidence here, the administrative law judge is constrained to conclude that claimant's tardies and one absence in view of all of the warnings the claimant received were not for reasonable cause and were excessive unexcused absenteeism. The claimant testified that she had a sleeping problem and she should not have been required to open the store but the claimant's testimony is not entirely credible because the claimant testified concerning the tardy on March 17, 2004 that she overslept because her alarm did not go off. Apparently, the claimant can get up on time and get to work if her alarm goes off. Therefore, the administrative law judge concludes that the claimant's tardies and one absence were excessive unexcused absenteeism and disqualifying misconduct.

The employer's witness, Kelly Green, Human Resources Assistant, also testified that the claimant was discharged for performance issues when she twice left the safe unlocked and finally on March 15, 2004 when she was consuming a soft drink from the employer without paying for it. The claimant conceded that she had consumed a soft drink belonging to the employer without paying for it. She testified that she took the soft drink intending to switch it with one that she had paid for but when she put it in the refrigerator noted that she did not have a soft drink in the refrigerator already paid for. Nevertheless, the claimant did not pay for the soft drink at that time and forgot about it and consumed it and, when reminded, denied drinking the soft drink. Finally the claimant admitted that she had lied about paying for the soft drink. Further, the claimant had failed to open the store on time on two prior occasions, August 3, 2002 and February 1, 2003. The administrative law judge concludes that claimant was late on both of these occasions and this further supports the excessive unexcused absenteeism determination but also notes that it is related to the claimant's performance. The claimant received warnings for failing to lock the safe and warnings for failing to open the store timely. The administrative law judge must conclude that the claimant's acts here were also deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,488.00 since separating from the employer herein on or about March 17, 2004 and filing for such benefits effective March 14, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 5, 2004, reference 01, is reversed. The claimant, Mary A. Kiernan, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits. She has been overpaid unemployment insurance benefits in the amount of \$1,488.00.

tjc/kjf