

**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**

**TANYA J KIPTANUI  
3718 – 47<sup>TH</sup> ST  
DES MOINES IA 50310**

**NEIGHBORHOOD PATROL INC  
3329 – 109<sup>TH</sup> ST  
URBAN DALE IA 50322**

**Appeal Number: 05A-UI-08394-DT  
OC: 07/24/05 R: 02  
Claimant: Respondent (1)**

**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.

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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Neighborhood Patrol, Inc. (employer) appealed a representative's August 15, 2005 decision (reference 01) that concluded Tanya J. Kiptanui (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 August 31, 2005. The claimant participated in the hearing. Dick Rogerson appeared on the employer's behalf and presented testimony from one other witness, David Lee. 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:

The claimant started working for the employer on January 26, 2005. She worked full time as a security guard at the employer's Des Moines, Iowa business client, which was a hotel. Her last day of work was July 25, 2005. The employer discharged her on that date. The reason asserted for the discharge was excessive tardiness and absences and watching television while on duty.

Prior to July 25, the claimant had three absences, at least two of which were due to illness, two tardies, and one leaving work early due to illness. On July 25 the employer received a report from a representative of the business client asserting that the claimant had been watching television while on duty. The representative also questioned whether the claimant was actually on the premises by her scheduled start time, as the client's staff never saw her until approximately 10 to 15 minutes after her scheduled start.

The claimant denied that she had ever watched television while on duty. On her shift that began the evening of July 24, 2005, the hotel desk person informed her that there were no guests staying of the fourth floor. The claimant had been instructed that if she knew that there were rooms that were supposed to be unoccupied, she was to go by the rooms and check to see that they were properly unoccupied, and that there were no lights or televisions left on. On the night of July 24, the claimant checked the rooms on the fourth floor and found approximately ten that had lights or televisions on. She had gone into one of the rooms to turn off the lights and television when her cell phone rang. She talked on her cell phone for about three minutes, and during that time, an assistant hotel manager came to the room and told the claimant that he did not want her to be in the rooms, even for checking them or turning off the lights or televisions.

The claimant further denied that she was reporting that she was at work on time if she was late. She acknowledged that the hotel front desk staff might not see her right away as she would check lower levels before coming into the front desk area.

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 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 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 that she had been watching television while on duty and that she had been reporting late for

work. However, the claimant denied the allegations, and 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 established its allegations, and 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 August 15, 2005 decision (reference 01) is affirmed. 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/kjw