

**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**

**NANCY L GOLDEN
810 LOOMIS ST APT 10
DES MOINES IA 50315**

**KATECHO INC
4020 GANNETT AVE
DES MOINES IA 50321**

**Appeal Number: 06A-UI-00008-RT
OC: 01-02-05 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, 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, Katecho, Inc., filed a timely appeal from an unemployment insurance decision dated December 19, 2005, reference 03, allowing unemployment insurance benefits to the claimant, Nancy L. Golden. After due notice was issued, a telephone hearing was held on January 18, 2006, with the claimant participating. Jayne Schmeling, Director of Human Resources, participated in the hearing for the employer. An observer for the employer sat in on the hearing. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The employer had not called in a telephone number before the hearing as instructed in the Notice of Appeal. When the administrative law judge reached the claimant he began the hearing. The employer's witness called the Appeal's Section at 9:09 a.m. and the administrative law judge called her back at 9:11 a.m. and she participated in the balance of the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full time inspector from July 5, 2005 until she was discharged on December 1, 2005. On November 28, 2005, the claimant received a telephone call from her supervisor, Charley Cox, warning the claimant that she faced discharge but not officially discharging the claimant. The claimant was then discharged for poor attendance on December 1, 2005. The claimant's absences and occasions when she left work early are shown at Employer's Exhibit One. Most of the claimant's absences and/or occasions when she left work early were excused by the employer because the claimant notified the employer in advance and obtained consent in advance for the absence or to leave work early. These absences or occasions when the claimant left work early were because of doctors' appointments or meetings with lawyers or general relief. In addition to those absences the claimant had other absences that were not excused by the employer. On August 8, 2005, the claimant was absent because of a doctor's appointment and an appointment with her lawyer but the claimant properly called in this absence. On August 31, 2005, the claimant was again absent for a doctor's appointment and appointment with her lawyer and an appointment with general relief. The claimant properly called in this absence. On September 26, 2005, the claimant was absent for illness and she properly called in this absence. On November 16, 2005, the claimant was absent or left work early for personal illness and this was properly called in to the employer. On November 21, 2005, the claimant left work early because she had a medical emergency involving her boyfriend. She properly called this in or informed the employer. On November 28, 2005, the claimant was absent for personal illness and she properly called this absence in. Finally, on November 30, 2005, the claimant was absent for personal illness and she properly called in this absence. When the claimant returned to work on December 1, 2005, she was discharged.

The claimant received a written warning on November 22, 2005 and a couple of oral warnings previously. The claimant would have received a written warning on November 29, 2005 for prior absences but she was absent that day and the next day and then discharged. The employer has an attendance policy as shown at Employer's Exhibit Two which involves points for absences when they are not prearranged in advance and approval or consent obtained. Pursuant to her claim for unemployment insurance benefits filed effective January 1, 2006, the claimant has received unemployment insurance benefits in the amount of \$402.00 as follows: \$134.00 per week for three weeks from benefit week ending January 7, 2006 to benefit week ending January 21, 2006. In a prior benefit year effective January 2, 2005, among other benefits, the claimant received unemployment insurance benefits in the amount of \$410.00 since separating from the employer herein on or about December 1, 2005 and reopening her claim for benefits in that benefit year effective November 27, 2005 as follows: \$82.00 per week for five weeks from benefit week ending December 3, 2005 to benefit week ending December 31, 2005. The claimant has received total benefits in the amount of \$812.00 since separating from the employer herein.

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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on December 1, 2005. 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 occasions when the claimant left work early and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The claimant's absences and occasions when she left work early are set out on Employer's Exhibit One. Most of them are excused by the employer and are not therefore excessive unexcused absenteeism. The unexcused absences shown on Employer's Exhibit One are set out in the Findings of Fact. The claimant was absent or left work early on those occasions either for personal illness or doctors' appointments or for appointments with her lawyer because she was dealing with a problem with her son or for general relief. The claimant always called in those absences. Even the employer's witness, Jayne Schmeling, Director of Human Resources, conceded that the claimant was good at calling in her absences. On the record here, the administrative law judge is constrained to conclude that these absences were for personal illness or reasonable cause and properly reported and are not excessive unexcused absenteeism.

It is true that the claimant received a couple of oral warnings and then a written warning on November 22, 2005 but as noted above, the administrative law judge concludes that the claimant's absences and occasions when she left work early were not excessive unexcused absenteeism. The administrative law judge specifically notes that the claimant never received a second written warning which she was to have received on November 29, 2005 but was absent. The claimant's absences and occasions when she left work early are numerous but the administrative law judge concludes, as noted above, that they were for personal illness or reasonable cause and properly reported. Accordingly, the administrative law judge concludes that the claimant's absences and occasions when she left work early were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. The administrative law judge notes that the claimant exceeded the points on the employer's attendance policy and was therefore discharged. However, Iowa Workforce Development Department rules for unemployment insurance benefits do not consider point attendance policies or no fault policies but rather looks to the reason for the absences and whether those absences were properly reported. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

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 \$812.00 since separating from the employer herein on or about December 1, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of December 19, 2005, reference 03, is affirmed. The claimant, Nancy L. Golden, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

kkf/tjc