

**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**

**KIMBERLY A PARKER
22½ - 2ND ST NE APT 2
MASON CITY IA 50401**

**MARSHALL & SWIFT INC
210 N DELAWARE ST
MASON CITY IA 50401**

**Appeal Number: 04A-UI-03051-DT
OC: 04/06/03 R: 02
Claimant: Appellant (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

STATEMENT OF THE CASE:

Kimberly A. Parker (claimant) appealed a representative's March 11, 2004 decision (reference 08) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Marshall & Swift, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 8, 2004. The claimant participated in the hearing. Kandi Hansen appeared on the employer's behalf and presented testimony from one other witness, Judy Hubbard. 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 December 15, 2003. She worked full time as a laborer in the employer's uniform and linen rental, dry cleaners, and laundry business. Her last day of work was February 9, 2004. The employer discharged her on February 13, 2004. The reason asserted for the discharge was excessive absenteeism.

The claimant was absent January 7, January 8, January 14, and January 27, 2004. Some of the absences were due to personal illness. On January 28, the claimant's supervisor, Kandi Hansen, gave the claimant a verbal warning. On January 29, the claimant came into work but reported that she needed to go to Chicago to be with her stepfather who had just suffered a stroke, and then left for the rest of the day. She indicated that she would not be in on Friday, but that she would try to be back on Monday, February 2. The claimant did not call or report for work on February 2.

She reported for work on February 3 and explained that she believed that Ms. Hansen had understood that she most likely would not be back on February 2. Ms. Hansen reminded the claimant that if she was going to be absent, she needed to call. On February 5 the claimant called and reported that she would be absent the rest of the week because she needed to go to Chicago again to say good-bye to her stepfather because he was dying; Ms. Hansen approved the absence.

The claimant reported back for work on Monday, February 9 and worked her regular shift. On February 10 the claimant came in and indicated that her stepfather had died, but that she did not need to go to Chicago again for the funeral as she had already said good-bye. She told Ms. Hansen that she needed to "collect" herself but that she would be back. She left and did not return that day, and was a no-call/no-show on February 11 and February 12. When she sought to report for work on February 13, she stated that she had gone to Chicago for her stepfather's funeral. The employer did not believe the claimant's report, as two other employees, including Ms. Hubbard, had seen the claimant in town on February 11. The claimant was therefore told that she was discharged.

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) 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).

(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 employer's testimony, substantiated by a witness, was more credible than the claimant's testimony, that the claimant had indicated that she was not going to go to the funeral and that she had in fact not left town. The claimant's final absence was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's March 11, 2004 decision (reference 08) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of February 13, 2004. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

ld/b