

**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**

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**GUADALUPE MCCARNEY
INTERPRETER
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DES MOINES IA 50312**

**Appeal Number: 04A-UI-07556-MT
OC: 06/13/04 R: 03
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:

Employer filed an appeal from a decision of a representative dated July 6, 2004, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 2, 2004. Claimant participated personally, represented by Ronnie Podolefsky, Attorney at Law with witnesses Cristina Hahn, and Roxie Galvez. Employer participated by Rick Wood, Human Resource Manager; Nick Duran, Operator; Charlene Schuman, Human Resource Coordinator; and Jennifer Stubbs, Human Resource Benefits Supervisor. Exhibits A through M and One were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer May 28, 2004.

Employer discharged claimant on June 11, 2004 because claimant was a no call for three days, June 8, 2004; June 9, 2004 and June 10, 2004. Claimant was told verbally and by written form that she was to return from her medical leave June 8, 2004. Claimant was at the doctor on June 8, 2004. Claimant received another off work slip for that time period. Claimant did not immediately take the excuse to employer. Claimant waited until June 11, 2004 to take the excuse to employer. Claimant asserts that she did not need to return to work until June 14, 2004. Claimant speaks some English. Claimant is not fluent in the English language. Claimant understands English sufficiently to get by. Claimant requires an interpreter for hearing and for serious legal matters.

REASONING AND CONCLUSIONS OF LAW:

The issue in this matter is whether claimant was discharged for misconduct.

871 IAC 24.32(1)a, (8) 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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge holds that the evidence has establish that claimant was discharged for an act of misconduct when claimant violated the employer's policy concerning absenteeism. Claimant was warned concerning this policy.

The last incident, which brought about the discharge constitutes misconduct because claimant incurred three no call absences in a row. This is in violation of employer's policy. Claimant was given a copy of the policy. Claimant had sufficient notice that her return to work date was June 8, 2004 notwithstanding her language barrier. The written form was given to claimant. There is no reason claimant would believe or any reasonable person would believe that she could take as much time as she wanted. Claimant stated that she thought she could be off to June 14, 2004 but brought the note in on June 11, 2004. This is a contradiction. If claimant really believed that she had time off to June 14, 2004 there was no reason at all to come in with the note June 11, 2004. Claimant did not act reasonable in keeping the employer informed of her need to be off. Claimant was at the doctor on June 8, 2003 and received an off work excuse but did not give it to employer until June 11, 2004. There is no excuse for this delay. This is not a question of language barrier. Claimant had an obligation to keep the employer informed of her off work status. Claimant completely failed to go back to the employer to inform them of her status June 8, 2004. Absenteeism due to illness is excused if properly reported. Here, claimant failed to report the absences in a timely fashion. Therefore, claimant was discharged for an act of misconduct and as such, is disqualified for the receipt of unemployment insurance benefits.

The next issue concerns an overpayment of unemployment insurance 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 holds that claimant is overpaid unemployment insurance benefits in the amount of \$4,776.00 pursuant to Iowa Code section 96.3-7 because a decision has determined the claimant to be ineligible to receive benefits due to a discharge for misconduct. Since claimant has been disqualified for the receipt of unemployment insurance benefits, the claim shall be locked until claimant has requalified or is otherwise eligible.

DECISION:

The decision of the representative dated July 6, 2004, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. Claimant is overpaid unemployment insurance benefits in the amount of \$4,776.00.

mdm\kjf