

**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**

**ANGELA MALANEY
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**Appeal Number: 04A-UI-02699-CT
OC: 02/01/04 R: 02
Claimant: Appellant (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

STATEMENT OF THE CASE:

Angela Malaney filed an appeal from a representative's decision dated March 3, 2004, reference 02, which denied benefits based on her separation from Best Suites. After due notice was issued, a hearing was held by telephone on April 7, 2004. Ms. Malaney participated personally and was represented by Paige Fiedler, Attorney at Law. The employer participated by Michael Monchino of Monchino Management, and was represented by Joe Happe, Attorney at Law. Exhibits One through Twelve were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Malaney initially began working for Best Suites in June 1999 as a front desk clerk. She left the employment in February 2000 and was rehired as general manager in March 2001. She was discharged from the employment on January 26, 2004 after the employer's insurance company concluded that she was no longer insurable. She was not insurable because she had a felony conviction on her record. The employer was aware of her criminal history by no later than October 2003. The matter of her criminal record was known by management as early as 2002. The employer did not contact the insurance company regarding Ms. Malaney until January 2004.

The decision to discharge Ms. Malaney was also based on her job performance. In September of 2003, the hotel's occupancy rate was 47.8 percent compared to 67.2 for other hotels in the same market. The administrative law judge was not provided statistics as to how the hotel performed during other periods, except as cited in inspection reports. The hotel received an "unacceptable" inspection in August 2003. The report noted that improvement needed to be shown and in which areas. Ms. Malaney was not at work during the week of the inspection. The hotel received an "acceptable" rating for the September review. During an October 23, review, it was noted that the property looked very good but that profits and the occupancy rate continued to be a problem. The hotel again received an "acceptable" rating in December but the employer was still unhappy with the revenue numbers. None of the inspection reports or the narrative comments attached indicated that Ms. Malaney was in danger of losing her job because of her performance. The hotel again received an "unacceptable" inspection in January. The inspection was completed on January 23 and Ms. Malaney was discharged on January 26

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Malaney was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer's burden included establishing that the discharge was predicated on a current act which constituted misconduct within the meaning of the law. In the case at hand, Ms. Malaney's discharge was triggered by the fact that the insurance company determined that she was not insurable. The question then becomes whether the failure to be insurable constituted an act of misconduct. In other words, it is a question of whether Ms. Malaney deliberately and intentionally engaged in conduct which rendered her uninsurable. She was not insurable because she had a felony conviction on her record. The criminal charges predated her employment with Best Suites and, therefore, it must be concluded that she did not engage in any criminal activity while in the employment. Even if the administrative law judge were to conclude that management had no knowledge of Ms. Malaney's criminal history before October 2003, her conviction would still not be a basis for disqualification from benefits. The employer took no steps regarding the information it received concerning the conviction until January 2004. The employer testified that a program was initiated in 2002 to do background checks on individuals being hired. Therefore, the employer knew or should have known in October that Ms. Malaney's criminal history might prevent her from working for the hotel. Because the employer took no action regarding the criminal history in October, any failure on Ms. Malaney's part to divulge her felony conviction was no longer a current act at the time of her discharge in January.

The administrative law judge does not doubt that Ms. Malaney failed to meet the employer's standards regarding her performance as a manager. She worked to the best of her abilities to correct those deficiencies which were brought to her attention. Because she was never put on notice that her performance might result in her discharge, she did not have a fair opportunity to take further steps to meet the employer's standards. The evidence failed to establish that Ms. Malaney deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. Although she was an unsatisfactory employee, she was not guilty of misconduct as that term is defined by the Iowa Employment Security Law. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated March 3, 2004, reference 02, is hereby reversed. Ms. Malaney was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/b