

**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**

**DORA N EINERTSON
1402 – 11TH ST
DES MOINES IA 50314**

**THARALDSON LODGING 1 – A INC
C/O ADP UNEMPLOYMENT GROUP/
UC EXPRESS
PO BOX 66744
ST LOUIS MO 63166-6744**

**Appeal Number: 05A-UI-06584-RT
OC: 05/08/05 R: 02
Claimant: Respondent (4-R)**

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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Tharaldson Lodging 1-A, Inc., filed a timely appeal from an unemployment insurance decision dated June 8, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Dora N. Einertson. After due notice was issued, a telephone hearing was held on July 12, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she, or any of her witnesses, could be reached for the hearing, as instructed in the notice of appeal. Regina Mott, Assistant General Manager, participated in the hearing for the employer. The employer was represented by Klaren Bentley of ADP Unemployment Group/UC Express. Tim Williams, was

available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a part-time front desk clerk from February 17, 2005, until she separated from her employment on May 8, 2005. The claimant averaged 28 hours per week. On May 8, 2005, the claimant was scheduled to work, as shown at Employer's Exhibit One. However, the claimant did not come to work nor did she notify the employer that she was not working. On May 9, 2005, the claimant called the employer's witness, Regina Mott, Assistant General Manager. Ms. Mott asked the claimant about the absence, and the claimant indicated that another clerk was supposed to have worked for her but did not show up. The other clerk had not agreed with the claimant to work on the claimant's shift on May 8, 2005. Further, as shown at Employer's Exhibit One, the employer requires that any changes to a shift must be approved by Ms. Mott, and the claimant did not get such approval. At that time Ms. Mott told the claimant that the employer considered her absence as a no-call/no-show and a resignation and accepted her resignation. The employer has a policy that provides that one absence as a no-call/no-show is considered a resignation or voluntary quit. The claimant signed a copy of this policy, as shown at Employer's Exhibit Three.

The claimant had other absences and tardies as follows: On March 20, 2005, the claimant was tardy seven minutes, and the employer did not know why and the claimant did not notify the employer. On March 19, 2005, the claimant was tardy one-half hour and the employer did not know why, and the claimant did not call. On March 17, 2005, the claimant was tardy one hour, and the employer did not know why, and the claimant did not call. The claimant was tardy on March 16, 2005, 10 minutes, and the employer did not know why, and the claimant did not call. The claimant was tardy on March 8, 2005, 15 minutes, and the employer did not know why, and the claimant did not call. The claimant was absent on February 25 and 26, 2005, for personal illness and she did timely report these absences. The claimant was tardy on February 24, 18, and 17, 2005, because of having to take her kids because her husband was angry that she had a job, but the claimant did not notify the employer of these tardies. The claimant received a written warning for attendance on March 18, 2005, and an oral warning on February 18, 2005, as shown at Employer's Exhibit Two.

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. The claimant's separation was a potentially disqualifying event because she voluntarily quit employment, but because the employment was part time, and the claimant is otherwise monetarily eligible for unemployment insurance benefits based on wages paid by other base period employers, the claimant shall not be disqualified. However, benefit payments to the claimant shall not be made based on wages paid by the part-time employer herein, and the account of the part-time employer herein shall not be assessed for any benefits for which the claimant is entitled.

2. Whether the claimant is overpaid unemployment insurance benefits. The administrative law judge cannot now determine whether the claimant is overpaid unemployment insurance benefits. This matter must be remanded to Claims for an investigation and determination, of among other matters, whether the claimant is overpaid unemployment insurance benefits.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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).

871 IAC 24.32(7) provides:

(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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she was a no-call/no-show on May 8, 2005, in violation of the employer's policy, as shown at Employer's Exhibit Three, which provides that one absence without notifying the employer will be considered a voluntary resignation. The claimant seems to maintain that she was discharged. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The employer's witness, Regina Mott, Assistant General Manager, credibly testified that the claimant was absent as a no-call/no-show on May 8, 2005. The claimant was scheduled to work that day, as shown at Employer's Exhibit One, but she failed to work that day. The claimant also failed to obtain permission from Ms. Mott for any change in the schedule. The claimant informed Ms. Mott that she had agreed with a co-worker for the co-worker to work for the claimant that day, but the co-worker denied this. The administrative law judge concludes on the evidence here that the claimant was absent as a no-call/no-show on May 8, 2005, and this is a voluntary quit per the policy of the employer, which policy was signed by the claimant, as shown at Employer's Exhibit Three. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide reasons attributable to the employer for her quit. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental, or that she was subjected to a substantial change in her contract of hire. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, her separation as a voluntary quit is potentially disqualifying.

However, the claimant appears to be otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers, and, therefore, she is not disqualified to receive unemployment insurance benefits. However, benefit payments to the claimant shall not be made based on wages paid by the part-time employer herein, and any unemployment insurance benefits to which the claimant is entitled shall not be charged or assessed against the account of the part-time employer herein. See 871 IAC 24.27. This matter is remanded to Claims for an investigation and determination as to whether the claimant is, in fact, monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers and, if so, what the claimant's weekly benefit would be excluding the wages paid by the part-time employer herein.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The claimant had eight tardies, as set out in the findings of

fact, none of which were for reasonable cause or personal illness and none that were properly reported to the employer. The claimant also had an absence on May 8, 2005, that was not for personal illness or reasonable cause and also not properly reported. Accordingly, the administrative law judge would conclude that these tardies and the claimant's absence on May 8, 2005, would be excessive unexcused absenteeism and disqualifying misconduct, and the claimant would be disqualified to receive 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 concludes that the claimant has received unemployment insurance benefits in the amount of \$808.00 since separating from the employer herein on or about May 8, 2005, and filing for such benefits effective May 8, 2005, as follows: \$101.00 per week for eight weeks from benefit week ending May 14, 2005, to benefit week ending July 2, 2005. The administrative law judge cannot now determine whether the claimant is overpaid any of such unemployment insurance benefits. This matter shall be remanded to Claims for an investigation and determination as to whether the claimant is overpaid any of such unemployment insurance benefits.

DECISION:

The representative's decision of June 8, 2005, reference 01, is modified. The claimant, Dora N. Einertson, voluntarily left her employment with the employer herein without good cause attributable to the employer. However, because the employment was part-time, and the claimant appears to be otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers, the claimant shall not be disqualified to receive unemployment insurance benefits. This matter shall be remanded to Claims for an investigation and determination as to whether the claimant is otherwise eligible to receive unemployment insurance benefits based on wages paid by other base period employers after removing from such consideration any wages paid by the part-time employer herein and, if so, a determination of the proper weekly benefit amount. Any unemployment insurance benefits to which the claimant may be entitled shall not be based on wages paid by the part-time employer herein, and any benefits to which the claimant is entitled shall not be assessed or charged against the account of the part-time employer herein, Tharaldson Lodging 1-A, Inc. This matter shall also be remanded to Claims for an investigation and determination as to whether the claimant is overpaid any unemployment insurance benefits that she has received since her separation from the employer herein on or about May 8, 2005.

REMAND:

This matter is remanded to claims for an investigation and determination as to whether the claimant is otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers, but excluding from such consideration, wages from the part-time employer herein because the claimant voluntarily left her part-time employment with the employer herein without good cause attributable to the employer. An investigation and determination shall also be made as to the weekly benefit amount to which the claimant is entitled. Finally, an investigation and determination shall also be made as to whether the claimant is overpaid any unemployment insurance benefits that she has received since her separation from the employer herein on or about May 8, 2005.

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