

**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**

**DANA P HARKER  
1214 JACKSON AVE  
SPIRIT LAKE IA 51360**

**BERKLEY INC  
1900 – 18<sup>TH</sup> ST  
SPIRIT LAKE IA 51360**

**Appeal Number: 05A-UI-00736-RT  
OC: 12-05-04 R: 01  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(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, Berkley, Inc., filed a timely appeal from an unemployment insurance decision dated January 7, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Dana P. Harker. After due notice was issued, a telephone hearing was held on February 7, 2005, with the claimant not participating. Although the claimant did call in a telephone number in advance of the hearing where he purportedly could be reached for the hearing, when the administrative law judge called that number at 10:01 a.m., the administrative law judge reached a voice mail identifying the voice mail as that for the number dialed by the administrative law judge and that provided by the claimant and also that as shown in Iowa Workforce Development records. The administrative law judge left a message that he was

going to proceed with the hearing and if the claimant wanted to participate, he needed to call before the hearing was over and the record was closed. The administrative law judge provided an 800 number for the claimant to use. The hearing began when the record was opened at 10:06 a.m. and ended when the record was closed at 10:24 a.m. and the claimant had not called during that time. Shelly Krause, Human Resources Director, participated in the hearing for the employer. Employer's Exhibit One was 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 witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: the claimant was employed by the employer as a full-time person in distribution, from March 15, 2004 until he was discharged on October 7, 2004. The claimant was discharged for misrepresentation and inconsistent reports to the employer about a serious matter involving the claimant's conviction for indecent contact with a child. The employer learned from a coworker that the claimant was on the sex offender registry when a copy of a portion of the sex offender registry was published in a local newspaper. The coworker reported this to the employer. The employer immediately met with the claimant. The employer asked the claimant about these matters. The claimant's response was that the minor had simply observed him having sex with an adult female. However, the employer learned differently from court records including that the claimant touched the minor in the minor's genital area. The employer believed that this misrepresentation and inconsistent statement with the facts merited discharge and discharged the claimant. The employer gave the claimant a fair chance. It investigated this matter while the claimant was on a paid leave of absence. The employer has integrity matters at stake in such a situation and the claimant was not forthcoming and truthful. After the claimant had been discharged, he contacted the employer and attempted to get the employer to refuse to participate further in unemployment insurance matters including fact finding. The employer's job application only applies to felonies and the claimant was convicted of an aggravated misdemeanor, indecent contact with a child. Pursuant to his claim for unemployment insurance benefits filed effective December 5, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,327.00 as follows: \$178.00 for benefit week ending December 11, 2004 (earnings \$130.00); \$247.00 per week for four weeks from benefit week ending December 18, 2004 to benefit week ending January 8, 2005; and \$161.00 for benefit week ending January 15, 2005 (earnings \$147.00).

#### 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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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).

The employer's witness, Shelly Krause, Human Resources Director, credibly testified, and the administrative law judge concludes, that the claimant was discharged on October 7, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. 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 was discharged for disqualifying misconduct. Ms. Krause credibly testified that the employer learned after the claimant was hired that the claimant was on the sex offender registry as being convicted of indecent contact with a child. A coworker reported this as a result of a portion of a sex offender registry being published in a local newspaper. The employer met with the claimant to get his story. The claimant's story was far different than what the employer learned when it obtained court documents. The employer gave the claimant a fair chance by airing the matter with the claimant and in an investigation while the claimant was on a paid leave. However, the claimant was not forthcoming and misrepresented the facts and misled the employer. The employer has a serious integrity issue especially in such a serious matter as this. The administrative law judge is constrained to conclude that the claimant's failure to be forthright and truthful to the employer was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. Although it appears irrelevant because it occurred after the discharge, the administrative law judge believes that it is relevant that the claimant called the employer and attempted to get the employer not to become involved with unemployment insurance matters. This further indicates that the claimant was not forthcoming with the employer when he should have been. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a

consequence, is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such 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 \$1,327.00 since separating from the employer herein on or about October 7, 2004 and filing for such benefits effective December 5, 2004. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of January 7, 2005, reference 01, is reversed. The claimant, Dana P. Harker, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,327.00.

pjs/b