

**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**

**GILDA Y CAMPOS REYES  
513 – 9<sup>TH</sup> ST APT #12  
SIOUX CITY IA 51101**

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**Appeal Number: 05A-UI-03260-RT  
OC: 01-23-05 R: 01  
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, 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 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Gilda Y. Campos Reyes, filed a timely appeal from an unemployment insurance decision dated March 21, 2005, reference 04, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on April 14, 2005, with the claimant participating. Rhoda Tenuta, Attorney at Law, represented the claimant. The claimant was assisted by an interpreter, Rosa Maria Paramo-Ricoy. Steven Joyce, Director of Human Resources, participated in the hearing for the employer, John Morrell & Company. The administrative law judge takes official notice of Iowa Workforce Development Department

unemployment insurance records for the claimant. Claimant's Exhibit A was admitted into evidence.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time general laborer on the second shift from October 18, 2004 until she was discharged on January 10, 2005. The claimant had previously been employed by the employer. The claimant was discharged for failing to respond to a letter dated December 30, 2004 to the claimant requiring the claimant to come to work and speak to the employer about coming back to work by January 10, 2005. When the claimant did not respond by coming to the employer on January 10, 2005, the employer sent the claimant a letter of that date discharging the claimant. The claimant last worked on December 9, 2004. The claimant was very ill and saw the employer's doctor on site who suggested that she see her own physician. She did so on December 10, 2004 and was immediately hospitalized. The claimant was suffering from a blood clot while pregnant. The claimant was hospitalized for approximately two weeks. The claimant was not permitted to work by her physician after being released from the hospital until she was released by her physician to return to work on January 17, 2005 as shown at Claimant's Exhibit A. The claimant had restrictions placed upon her including occasionally lifting no more than 20 to 34 pounds and requiring that she frequently sit.

When the claimant was first hospitalized, the claimant sent a note to the employer through her cousin, Santana Lopez. Approximately one to two weeks later the claimant gave another note to Ms. Lopez who again delivered it to the employer. Ms. Lopez also occasionally spoke to the claimant's supervisor, Mike Hartman, about the claimant's condition. The notarized statement of Ms. Lopez appears at Claimant's Exhibit A. At all material times hereto, the employer was aware of the claimant's physical condition. On December 30, 2004, the employer sent a letter to the claimant asking that the claimant come to the employer by January 10, 2005 to discuss her absences and her medical condition. This letter was sent certified mail, return receipt requested, but was never received by the claimant. The employer never received a return receipt. The claimant was either in the hospital or living with her cousin because she could not take care of herself and needed extra care. The claimant did not report to the employer by January 10, 2005. When the claimant did not report to the employer by January 10, 2005, the employer wrote a letter to the claimant of that date indicating that she was discharged for failure to report. The employer has a rule that an employee who is going to be absent must call the employer. The claimant believed that she had appropriately notified the employer through the contacts made by her cousin, Ms. Lopez. On January 17, 2005, the claimant went to the employer's personnel office. She provided the employer with the release to return to work with the work restrictions as shown as Claimant's Exhibit A. However, the employer informed the claimant that since she had not responded to the two letters, she was considered discharged. The claimant's union requested that the employer reconsider and it did so but still determined to discharge the claimant. Other than the restrictions as noted above, the claimant has placed no other restrictions on her ability to work including either physical kinds of restrictions or training kinds of restrictions. The claimant has placed no restrictions on her availability to work including days or times when she could or could not work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week. By decision dated February 7, 2005, at reference 02, Iowa Workforce Development issued a decision indicating that the claimant is able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits for any of those reasons.

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 not.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for these records.

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 parties agree that the claimant was discharged but disagree as to the date. The employer's witness, Steven Joyce, Director of Human Resources, testified that the claimant was discharged on January 10, 2005 when a letter of that date was sent to the claimant. The claimant testified that she was discharged on January 17, 2005 when she returned to work with a doctor's release and was told that she had previously been discharged. The administrative law judge concludes the claimant was discharged effectively on January 10, 2005 by the letter from the employer even though the claimant may not have received the letter. In order to be disqualified to receive unemployment insurance benefits pursuant to her discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including, excessive unexcused absenteeism.

Concerning the claimant's absences, the claimant was absent from work from December 10, 2004 until she returned to the employer on January 17, 2005. However, it is uncontested that the claimant was seriously ill during this period of time and this is confirmed by the doctor's statements at Claimant's Exhibit A. The employer has no evidence that the claimant was not either hospitalized or so ill that she could not come to work. Accordingly, the administrative law judge concludes that the claimant's absences were for personal illness. The real issue here is whether the claimant properly reported her absences.

The administrative law judge concludes that the claimant's absences were properly reported to the employer. It is true that the claimant did not call the employer everyday of her absence and notify the employer that she was going to be absent. However, the evidence establishes that the claimant had a note from her physician delivered to the employer on or about December 10, 2004 indicating that the claimant was hospitalized. This was confirmed by the affidavit of the claimant's cousin, Santana Lopez as shown at Claimant's Exhibit A and is further confirmed by Mr. Joyce who conceded that he was aware of the claimant's hospitalization and serious medical condition. A second doctor's note was delivered to the employer on December 16, 2004. Ms. Lopez also kept the claimant's supervisor, Mike Hartman, apprised of the claimant's condition. Even Mr. Joyce concedes that Ms. Lopez contacted Mr. Hartman at least twice. In view of the claimant's serious physical condition and her hospitalization for approximately two weeks, the administrative law judge concludes that the claimant properly reported her absences. Therefore, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct.

Mr. Joyce testified that the real reason for the claimant's discharge was her failure to respond to a letter dated December 30, 2004 instructing the claimant to come to the employer and discuss her physical condition by January 10, 2005. However, Mr. Joyce testified that he did not even know if the claimant was able to come to the employer as requested. The claimant credibly testified that she never received the letter. This is confirmed by Mr. Joyce who testified that although the letter was sent certified mail, return receipt requested, he had no return receipt. The administrative law judge concludes that the claimant never received that letter. The

administrative law judge also concludes that it should have been clear to the employer that the claimant never received that letter when it never received a return receipt and the employer was aware of the claimant's serious medical condition. The claimant credibly testified that after being discharged from the hospital she had to go live with Ms. Lopez because she lived by herself and could not take care of herself in view of her medical condition. The claimant also testified that Ms. Lopez never said anything to her about the employer requiring that the claimant contact the employer. In fact, there is no evidence that Ms. Lopez was ever asked by the employer to convey any messages to the claimant or that Ms. Lopez knew about the letter dated December 30, 2004. The administrative law judge concludes that the claimant's failure to respond to the letter dated December 30, 2004 was not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical

ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she is and was at relevant times able, available, and earnestly and actively seeking work. The claimant credibly testified that she returned to the employer on January 17, 2005 with a doctor's release releasing the claimant to return to work. This is confirmed by the doctor's release at Claimant's Exhibit A. The claimant was given some restrictions, requiring that she frequently sit and that she not lift over 20 to 34 pounds except occasionally. These restrictions still apply to the claimant but the claimant credibly testified that she has no other restrictions on her ability to work. The administrative law judge concludes that these restrictions do not unreasonably impede her opportunity for employment. The administrative law judge notes that it is not necessary for the claimant to be able to work in her customary occupation but only that she be able to work in some gainful employment and the administrative law judge so concludes. The claimant credibly testified that she is available for work and is earnestly and actively seeking work and there is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits for those reasons. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible and remains able, available, and earnestly and actively seeking work.

**DECISION:**

The representative's decision of March 21, 2005, reference 04, is reversed. The claimant, Gilda Y. Campos Reyes, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. The claimant is able, available, and earnestly and actively seeking work.

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