

**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**

**DAVID F DOWLING JR
PO BOX 176
TREYNOR IA 51575-0176**

**GORDMANS
c/o JOHNSON AND ASSOCIATES
NOW TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-05046-RT
OC: 04-04-04 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, 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 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Gordman's, filed a timely appeal from an unemployment insurance decision dated April 23, 2004, reference 01, allowing unemployment insurance benefits to the claimant, David F. Dowling, Jr. After due notice was issued, a telephone hearing was held on May 27, 2004 with the claimant not participating. The claimant did not call-in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Kristina Toth, Guest Services Manager, participated in the hearing for the employer. The employer was represented by Alyce Smolsky of Johnson and Associates, now TALX UC eXpress. Employer's Exhibits 1 and 2 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 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a part-time guest services associate from November 4, 2003 until he separated on February 9, 2004. The claimant was part-time and his hours varied. The claimant was absent as a no-call/no-show without notifying the employer on January 17 and January 18, 2004 and further absent as a no-call/no-show on two additional days, February 4 and February 8, 2004 when he was scheduled to work for someone else. The claimant has never returned to the employer and offered to go back to work and has not worked for the employer since prior to January 17, 2004. The employer has a policy in its handbook providing that upon three consecutive absences as a no-call/no-show, the employee can be terminated. The claimant received a copy of this handbook and signed an acknowledgement as shown at Employer's Exhibit 2. When the claimant failed to show up for work he was treated as a voluntary quit and terminated as shown at Employer's Exhibit 1. The claimant never expressed any concerns to the employer's witness, Kristina Toth, Guest Services Manager, about his working conditions nor did he do so to anyone else that Ms. Toth heard about. The claimant also never indicated or announced an intention to quit to Ms. Toth if any problems he was having at work were not addressed by the employer nor did he do so to anyone else that Ms. Toth heard about. Work remained available for the claimant had he shown up for work.

Pursuant to his claim for unemployment insurance benefits filed effective April 4, 2004, the claimant has received unemployment insurance benefits in the amount of \$300.00 as follows: \$60.00 per week for five weeks from benefit week ending April 10, 2004 to benefit week ending May 8, 2004. Deducting wages earned from the employer herein, the claimant had wages in only one quarter during his base period.

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 96.5-1 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.

871 IAC 24.25 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa

Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer.

871 IAC 24.25(4) provides:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant quit when he was absent as a no-call/no-show for more than three consecutive days and, in fact, never returned to work. The claimant seems to maintain that he was laid off for a lack of work. However, the employer's witness, Kristina Toth, Guest Services Manager, credibly testified that work remained available for the claimant had he shown up for work and that he simply quit coming to work and did not notify the employer. Being absent three days without giving notice to the employer in violation of the employer's rule is a voluntary quit and is not good cause attributable to the employer. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his 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 his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide evidence of reasons attributable to the employer for his quit. Leaving work voluntarily when he was absent for three days without giving notice to the employer is not good cause attributable to the employer. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that he was subjected to a substantial change in his contract of hire. The evidence merely suggests that the claimant quit coming to work even when he had agreed to cover for other coworkers. There is also no evidence that the claimant ever expressed any concerns to the employer about his working conditions or that he ever indicated or announced an intention to quit if any of his concerns were not addressed.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

The administrative law judge notes that the claimant's voluntary quit from the employer herein was from part-time employment. However, excluding the earnings from the employer herein, the claimant only had earnings from another employer in one quarter of his base period and the claimant is, therefore, not otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by his regular or other base period employers and therefore 871 IAC 24.27, concerning a voluntary quit of part-time employment, is not applicable here.

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 \$300.00 since separating from the employer herein on or about February 9, 2004 and filing for such benefits effective April 4, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 23, 2004, reference 01, is reversed. The claimant, David F. Dowling, Jr., is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he left work voluntarily without good cause attributable to the employer. The claimant has been overpaid unemployment insurance benefits in the amount of \$300.00.

tjc/b