

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

RANAE L GRAY
314 – 3RD ST SE
BRITT IA 50423

SUNTRON CORPORATION
C/o ADP UNEMPLOYMENT GROUP
UC EXPRESS
PO BOX 66744
ST LOUIS MO 63166-6744

Appeal Number: 05A-UI-12250-RT
OC: 11/21/04 R: 02
Claimant: Respondent (1)

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, Suntron Corporation, filed a timely appeal from an unemployment insurance decision dated November 22, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Ranae L. Gray. After due notice was issued, a telephone hearing was held on December 20, 2005, with the claimant participating. Nancy Troe, Human Resources Manager, and Peggy Ford, Production Supervisor, participated in the hearing for the employer. The employer was represented by Gregory Anello of ADP Unemployment Group, UC Express. 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, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time production assembler #3 lead, from April 27, 1986 until she separated from her employment on October 10, 2005. On that day, October 10, 2005, the claimant went to work and said to Peggy Ford, Production Supervisor and one of the employer's witnesses, something to the effect that she was done or that she quit. The claimant had determined to quit on October 7, 2005 when she was absent. The claimant was frustrated with her job because the employer was adding more work for the claimant to do. The claimant felt that she could no longer do the work anymore and keep up. She had expressed concerns to Ms. Ford on a number of occasions, the last time on September 23, 2005, when she met with Ms. Ford about a warning for attendance discussed below. Ms. Ford conceded to the claimant that she needed help and was attempting to work with the claimant to provide additional assistance but had not done so and the claimant quit. The claimant did not specifically indicate to Ms. Ford on these occasions that she would quit if her concerns were not addressed by the employer. The claimant had also expressed concerns to Chuck McManus but no results were forthcoming. The claimant did not submit any written letter of resignation. The claimant also did not raise her concerns using any work related grievance process. The claimant was so busy that she was having to take work home and she was becoming exhausted.

The claimant was developing an attendance problem. In addition to the absence on October 7, 2005, the claimant was at least tardy on September 23, 2005. The claimant had been up all night crying about her job and did not know what to do but felt that she could not do her job anymore. She did not notify the employer until approximately 11:00 a.m. although her shift began at 5:00 or 6:00 a.m. The employer has a rule that requires that an employee notify management of any absence or tardy one half hour before the start of that employees shift. This is by way of an amendment in the employee's handbook, a copy of which the claimant received and of which she was aware. When the claimant called the employer she was told to come in and talk. She did so and received a final step warning as shown at Employer's Exhibit One for her attendance. The claimant was also absent on April 8, 2005 because she overslept. She did not call the employer until after the start of her shift. The claimant had no reason why she did not call timely and report her absence other than she overslept. For this absence the claimant received a written formal warning or a "step II" warning as shown at Employer's Exhibit One. The claimant was then absent on February 4, 2005 because she was ill and overslept. She did not promptly notify the employer of that absence. For this absence the claimant received a verbal formal warning with a written record called a "step I" warning as shown at Employer's Exhibit One. The claimant also received a warning concerning her attendance on September 9, 2003.

Pursuant to her claim for unemployment insurance benefits filed effective November 21, 2004, the claimant received, among other benefits, \$668.00 as follows: \$334.00 for two weeks, benefit weeks ending November 12 and 19, 2005. The claimant then opened a new benefit year effective November 20, 2005 and has received unemployment insurance benefits in the amount of \$921.00 for that benefit year as follows: \$291.00 for benefit week ending November 26, 2005 (earnings \$130.00); \$337.00 for benefit week ending December 3, 2005 (earnings \$68.00); and \$293.00 for benefit week ending December 12, 2005 (earnings \$128.00). Total benefits received by the claimant since her separation are \$1,589.00.

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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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 24.26(2), (3), (4) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (2) The claimant left due to unsafe working conditions.
- (3) The claimant left due to unlawful working conditions.
- (4) The claimant left due to intolerable or detrimental working conditions.

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 is adamant that the claimant was discharged on October 10, 2005 when she came to work asking if she had a job and she was informed that she did not. The claimant is equally adamant that she left her employment voluntarily or quit on October 10, 2005 when she came to work and informed Peggy Ford, Production Supervisor and one of the employer's witnesses, that she was done. Although it is a close question, the administrative law judge is constrained to conclude that the employer has not demonstrated by a preponderance of the evidence that the claimant was discharged. At the out set, the administrative law judge notes that the testimony of the two employer's witnesses were not particularly credible. The testimony of the two witnesses was inconsistent with each other. For example, concerning the absence on October 7, 2005, one witness testified that the claimant never called in and that the absence was a no-call/no-show. The other witness said that the claimant called in and said she was going to be absent because of issues. Neither witness could testify as to the specific times that the claimant's shifts began. On April 8, 2005, again one witness testified that the claimant notified the employer late and the other witness testified that the claimant never notified the employer. Accordingly, the administrative law judge concludes that the claimant's testimony is more credible and that she determined to quit on October 7, 2005 when she was absent and then informed the employer of this on October 10, 2005 when she came to work. The claimant's absence on October 7, 2005, without notifying the employer, seems to support the claimant's testimony that she had made up her mind to quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on October 10, 2005. 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 met 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 credibly testified that she left her employment because she was required to do more and more work and could not keep up. She testified that she even had to take work home with her. The claimant credibly testified that she could not do the work anymore. The claimant also testified that she expressed concerns to Ms. Ford about these matters on a number of occasions. Ms. Ford even concedes that the claimant did express such concerns to her and

further concedes that she was attempting to work with the claimant to obtain more help. This confirms the claimant's testimony. Although the claimant never specifically announced an intention to quit if her concerns were not addressed. That is no longer a requirement to receive unemployment insurance benefits. See Hy-Vee, Inc., v. Employment Appeal Board, No. 86/04-0762 (Iowa 2005). The administrative law judge concludes that the continuing increase in the claimant's work without addressing her concerns about health makes her working conditions intolerable or detrimental and perhaps unsafe and unlawful. The claimant's quit does not appear to be mere whim or last-minute decision; the claimant had worked for the employer for almost 20 years. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily with good cause attributable to the employer and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

Even if the claimant's separation should be considered a discharge, the administrative law judge would conclude that the claimant was not discharged for disqualifying misconduct. The only reason for the claimant's discharge would be excessive unexcused absenteeism. The evidence establishes that the claimant had in 2005 only four absences or tardies as set out in the findings of fact. The administrative law judge also concludes that not all of these absences were because the claimant overslept. The claimant testified that she was sick on February 4, 2005 and this caused her to oversleep. The administrative law judge concludes that that absence was for personal illness and the claimant had an excuse for not properly and timely reporting that absence. The claimant also testified that on September 23, 2005 she was absent because she had been up all night crying about her job. The administrative law judge concludes that the claimant had reasonable cause for this absence and her delay in reporting it was justifiable. For the absence on April 8, 2005, the evidence establishes that the claimant probably overslept on that day and notified the employer late and did not notify the employer at all on November 7, 2005. Assuming that these two absences were not for reasonable cause or personal illness and not properly reported, they still do not establish excessive unexcused absenteeism. In general, three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant only had two. The claimant did receive some warnings as shown at Employer's Exhibit One but the administrative law judge notes that that two of those warnings occurred over five months before the claimant was discharged. Accordingly, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged but not for disqualifying misconduct, including excessive unexcused absenteeism, and she would still not 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 \$1,589.00 since separating from the employer herein on or about October 10, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of November 22, 2005, reference 02, is affirmed. The claimant, Ranae L. Gray, is entitled to receive unemployment insurance benefits provided she is otherwise eligible, because she left her employment voluntarily with good cause attributable to the employer. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

dj/kjw