

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

PATRICK D MCILHON
3011 AURORA AVE
DES MOINES IA 51310

VAN GINKEL ATHLETIC MFG CO
2208 INGERSOLL
DES MOINES IA 50312

Appeal Number: 04A-UI-01581-HT
OC: 08/10/03 R: 02
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 96.5-2-a – Discharge
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, Van Ginkel, filed an appeal from a decision dated February 11, 2004, reference 03. The decision allowed benefits to the claimant, Patrick McIlhon. After due notice was issued a hearing was held by telephone conference call on March 4, 2004. The claimant provided a telephone number of (515) 255-3009. That number was dialed at 11:00 a.m. and the only response was a voice mail. A message was left notifying the claimant the hearing would proceed without him unless he called the Appeals Bureau prior to the end of the hearing. By the time the record was closed at 11:17 a.m. the claimant had not responded to the message and did not participate. The employer participated by President Joe Van Ginkel.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Patrick McIlhon was employed by Van Ginkel from September 8, 2003 until January 16, 2004. He was a full-time retail sales associate.

Throughout the course of his employment, the claimant was the subject of a number of customer complaints. He would engage some customers in lengthy conversations while ignoring customers who came in later. During these conversations he would also not answer the business phone. Other customers complained Mr. McIlhon displayed prejudice toward certain schools, although no specifics were given.

President Joe Van Ginkel did not issue any formal disciplinary actions to the claimant, although he did indicate that Mr. McIlhon needed to "do better." However, a number of verbal warnings were given to him about not clocking in before his shift started at 10:00 a.m. He was in the habit of clocking in 30 to 60 minutes early, during which time he would do crossword puzzles and listen to the radio. He would often be seen doing the same thing during regular working hours.

On January 16, 2004, the claimant again punched in 30 minutes early. The employer felt his performance was not improving and someone more qualified needed to be hired before the spring athletic season. Mr. Van Ginkel informed the claimant he was discharged.

Patrick McIlhon has received unemployment benefits since filing an additional claim with an effective date of January 18, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 claimant had been advised his job was in jeopardy as a result of his poor work performance, customer complaints and punching in early. He refused to abide by the company rules about punching in prior to the start of his shift. The final occurrence of punching in early was the precipitating event. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of February 11, 2004, reference 03, is reversed. Patrick McIlhon is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$1,000.00.

bgh/s