

**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**

**LINDA L MCCAUGHEY
2201 E MAPLE FRONT APT
DES MOINES IA 50317**

**C V K CORPORATION
D/B/A WHYLIE EYE CARE CENTERS
3725 INGERSOLL AVE
DES MOINES IA 50312**

**Appeal Number: 04A-UI-04770-RT
OC: 03-28-04 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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, C V K Corporation, doing business as Whylie Eye Care Centers, filed a timely appeal from an unemployment insurance decision dated April 14, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Linda L. McCaughey. After due notice was issued, a telephone hearing was held on May 19, 2004 with the claimant participating. Kenton Cople, Owner, participated in the hearing for the employer. 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 as a full-time optical lab technician from April 11, 2002 until she was discharged on January 22, 2004 for attendance and for a failure to complete a drug abuse rehabilitation treatment program. The claimant had also been previously employed by the employer and discharged for attendance. In the fall of 2003, the claimant was having a serious attendance problem because of drugs. She had been previously discharged for her attendance and then received a written warning on October 22, 2003 as well as several verbal warnings. The claimant came to the owner, Kenton Copple, and told him that she wanted to get help. Mr. Copple agreed to give the claimant time off to attend a drug abuse treatment program but she had to complete the program before she could return to work. The claimant accepted.

The claimant was off work beginning December 31, 2003 and started the program sometime thereafter but failed to complete the program. The claimant was terminated from the program because she would not show up to attend the sessions for the program. However, the claimant never informed the employer that she had not completed the program or that she had been terminated from the program. The claimant worked sporadically during this time but the employer assumed that the claimant was appropriately attending the drug treatment program. On or about January 19, 2004, the claimant consulted Mr. Copple and asked to return to work. He agreed assuming that the claimant had completed the program. The claimant did not work on January 19 and January 20, 2004 and could give no reason why. The claimant worked on January 21, 2004. The claimant was then absent again on January 22, 2004 and had no reason. When the claimant did not show up for work on January 22, 2004, Mr. Copple called the drug treatment program and learned that the claimant had been terminated from the program and had not completed the program. The claimant was then discharged by a telephone call on that day. For the two weeks previous, the employer expected the claimant to return to work but the claimant would inform the employer that she was still in treatment and would not be in to work that week. The employer went along with the claimant because they expected her and wanted her to complete the treatment and that was the condition upon which she could return to work. There were no other reasons for the claimant's discharge.

Pursuant to her claim for unemployment insurance benefits filed effective March 28, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,044.00 as follows: \$174.00 per week for six weeks from benefit week ending April 3, 2004 to benefit week ending May 8, 2004.

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. She 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).

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.

In order to be disqualified to receive unemployment insurance benefits pursuant to a 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). 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, including excessive unexcused absenteeism. Concerning the claimant's absences, the evidence establishes that in the fall of 2003 the claimant was having an attendance problem because of her use of illegal drugs. She received

several verbal warnings and a written warning on October 27, 2003. Further, the claimant had been previously discharged for attendance. The claimant denied this but her denial is not credible. The claimant was given permission to be absent from work while attending a drug treatment program if she completed the program. The claimant missed work to attend a drug treatment program but did not complete the program and, in fact, was terminated from the program because she refused to show up for treatment. The claimant could give no reasons why she did not complete the program or why she failed to show up for the program. The evidence establishes that the claimant was absent, at least, on January 19, January 20 and January 22, 2004 after dropping out of the program and notifying the employer that she wanted to come back to work and implying that she had completed the program. The claimant could give no reasons for these absences. The administrative law judge concludes that those three absences were not for reasonable cause and were excessive unexcused absenteeism. The claimant concedes she was absent on those days without offering a reason. The claimant had had an attendance problem because of her use of drugs and had been warned about that both verbally and in writing on October 27, 2003. The administrative law judge also concludes that some of the claimant's other absences during the time that the employer believed that she was in the drug treatment program are also not for reasonable cause and not properly reported and further establishes excessive unexcused absenteeism.

The administrative law judge also concludes that claimant's failure to complete the program as a condition for the employer's permission to be absent and as a condition to return to work and as promised by the claimant is a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. The employer granted the claimant time off to attend a drug treatment program if she attended it and completed it. The employer was trying to help the claimant. The claimant did not complete the program and did not inform the employer of this and attempted to return to work without completing the program as agreed. The claimant could offer no reason why she did not complete the program. The administrative law judge is constrained to conclude that the claimant's failure to complete the program by simply failing to come to the program and not informing the employer is disqualifying misconduct.

In summary, 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, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she 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 \$1,044.00 since separating from the employer herein on or about January 22, 2004 and filing for such benefits effective March 28, 2004, to which she is not entitled and for which she 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 14, 2004, reference 01, is reversed. The claimant, Linda L. McCaughey, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$1,044.00.

tjc/kjf