

**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**

**BRANDON D EFKAMP
624 S MONTANA ST
BOONE IA 50036**

**BOONE COMMUNITY SCHOOL DIST
500 – 7TH ST
BOONE IA 50036-2838**

**JEAN PENDLETON
ATTORNEY AT LAW
319 – 7TH ST STE 600
DES MOINES IA 50309**

**Appeal Number: 04A-UI-08898-RT
OC: 07-18-04 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 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Boone Community School District, filed a timely appeal from an unemployment insurance decision dated August 6, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Brandon D. Efkamp. After due notice was issued, a telephone hearing was held on September 23, 2004 with the claimant participating. The claimant was represented by Jean Pendleton, attorney at law. Joleen Efkamp, the claimant's mother, testified for the claimant. Joseph Kirchoff, Superintendent of schools, participated in the hearing for the employer. Claimant's Exhibits A through E and G were admitted into evidence. There was no Claimant's Exhibit F. The administrative law judge takes official notice of Iowa Workforce

Development Department unemployment insurance records for the claimant. The hearing was originally scheduled for September 9, 2004 at 10:00 a.m. and rescheduled at the claimant's request by his attorney.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibits A through E and G, the administrative law judge finds: The claimant was employed by the employer as a full-time custodian from June 30, 2003 until he was discharged effective June 30, 2004 when the employer chose not to renew the claimant's contract for another school year. The claimant was assigned to building B and food services which was part of the high school. The claimant was discharged because the employer believed that the claimant was not getting his job done. The employer believed that the claimant was not keeping the cafeteria clean during the extended lunch taking over two hours, which was one of his duties. The claimant was not always able to attend to the lunch room appropriately because he was frequently asked by cooks or lunch staff to run errands for them which made it hard for him to keep the cafeteria clean during the extended lunch period. The employer also believed that the claimant was failing to keep the hallways, stairwells, and restrooms clean in the area to which he was assigned and, further, did not always dump trash. The claimant's hours were from 7:00 a.m. to 3:30 p.m. and keeping the entire area clean at the same time factoring in his lunch duties was too much for the claimant to keep up with. The claimant has Cerebral Palsy which has caused a weakness in his left arm and leg and does delay the claimant in doing some of his tasks. The employer did hire a bus driver to help the claimant but he did not regularly help the claimant and then only for one hour per day. The employer also obtained a student to help the claimant but this help was sporadic and also not regular. The claimant received a written warning on December 18, 2003 advising him that he was not completing his job duties in a timely manner. Other warnings were issued to the claimant but it is uncertain whether the claimant was apprised of these warnings. Some of these alleged failures were also discussed with the claimant during his evaluation on May 14, 2004. At that time, the employer was going to move the claimant to a night shift position because the employer believed, as did the claimant, that it would be easier. However, other custodians objected and the claimant was not transferred but was discharged. The claimant attempted to do the job as best he could. The claimant did not intentionally or deliberately stand back from work when he was being assisted. Pursuant to his claim for unemployment insurance benefits filed effective July 18, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,227.00 as follows: \$211.00 for benefit week ending July 24, 2004 (vacation pay \$77.00) and \$288.00 per week for seven weeks from benefit week ending July 31, 2004 to benefit week ending September 11, 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 parties testified, and the administrative law judge concludes, that the claimant was discharged effective June 30, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. 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. At the outset, the administrative law judge concludes that there is not a preponderance of the evidence that claimant's alleged failures in performing his job duties in a timely fashion were either deliberate acts constituting a material breach of his duties or evinced a willful or wanton disregard of the employer's interests and, as a result, the claimant's alleged failures are not disqualifying misconduct for those reasons.

The more difficult question is whether the claimant's alleged failures were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Here, the administrative law judge concludes that they are not such recurring negligence or carelessness. The claimant conceded that he did not always get all of his duties done at least in a timely fashion. The claimant had some explanations including being asked to run errands for the cafeteria cooks or cafeteria staff which took away time from his job cleaning the cafeteria during

the extended lunch. The claimant credibly testified that he attempted to do the job to the best of his abilities. The claimant also credibly testified that he has Cerebral Palsy which causes a weakness in his left arm and leg which causes the claimant to take longer to do some of his duties. The employer was, at all times material hereto, aware of the claimant's disability. The employer had administered a test to the claimant, the results of which indicated that the claimant could do the work. However, it appears to the administrative law judge that the claimant's main failure was a difficulty in doing his work timely but that he made every effort to do so. There is not a preponderance of the evidence that the claimant stood around when others were assisting him. Accordingly, the administrative law judge concludes that claimant's behavior was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that claimant's behavior and his failures here were mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity or ordinary negligence in an isolated instance and are not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, he 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, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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 \$2,227.00 since separating from his employment on or about June 30, 2004 and filing for such benefits effective July 18, 2004. 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 August 6, 2004, reference 01, is affirmed. The claimant, Brandon D. Efkamp, is entitled to receive unemployment insurance benefits, provided he is

otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

tjc/tjc