

**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**

**MARIA G NUNEZ-CADENA
1912 BREESE AVE
MUSCATINE IA 52761**

**MANPOWER INTERNATIONAL INC
MANPOWER TEMPORARY SERVICES
c/o TALX UC EXPRESS
PO BOX 66864
ST LOUIS MO 63166-6864**

**Appeal Number: 04O-UI-09419-DT
OC: 05/23/04 R: 04
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 are 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 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Manpower Temporary Services (employer) appealed a representative's June 8, 2004 decision (reference 01) that concluded Maria G. Nunez-Cadena (claimant) was qualified to receive unemployment insurance benefits, and the employer's account could be subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 15, 2004 under appeal number 04A-UI-06779-DWT. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which she could be contacted to participate in the hearing. As a result, no one represented the claimant. Maria Way, a staffing specialist, appeared on the employer's behalf. An administrative law judge's decision was issued in that case on July 16, 2004 specifically noting the claimant's failure to respond and participate, and reversing the representative's decision and disqualifying the claimant from benefits.

Because of a change in address, the claimant did not receive the administrative law judge's decision until August 3, 2004. She appealed to the Employment Appeal Board, asserting that she had not participated in the July 15 hearing because she had not received the hearing notice due to her change in address. By order dated August 26, 2004, the Board remanded the case back to the Appeals Bureau for a new hearing. Hearing notices were mailed to the parties' last-known addresses record, specifically for the claimant, to the address provided in her appeal to the Board, for a hearing to be held at 1:30 p.m. on September 28, 2004, for a new hearing under appeal number 04A-UI-09419-DT, the current case. The claimant again failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. The employer responded to the hearing notice and indicated that a representative would participate. When the administrative law judge contacted the employer's representative for the hearing, the representative requested that the administrative law judge make a determination based upon a review of the information in the administrative file, specifically including the hearing record created on July 15, 2004 in appeal number 04A-UI-06779-DWT, and requested that the administrative law judge reinstate the prior administrative law judge's decision.

The administrative law judge considered the record closed at 1:40 p.m. At 3:08 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on a review of the information in the administrative file, the record of the July 15, 2004 hearing, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened?

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the September 28, 2004 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The claimant believed that she had responded by calling the Appeals Section about two weeks prior to the hearing. However, the claimant did not have a control number, which the Appeals Section issues to each party who calls in for a hearing to verify that they have called. An entry of a call from the claimant does not appear in the call-in logbooks maintained by the Appeals Section, which were checked for each day beginning July 9, 2004, the day after the notices were mailed. Neither did the claimant recall to whom she had spoken, nor had she been given the instructions routinely given to parties who call in as to what they should do if they do not get a call within a certain time after the designated hearing time.

The claimant registered to work for the employer's clients on March 30, 2004. The employer assigned the claimant to a job on March 31, 2004. The employer told the claimant how important it was for her to work as scheduled at this assignment.

On April 4, 11 and 13, the claimant was scheduled to work 4:00 a.m. to 2:00 p.m. She reported to work late each of these days. She was 15 minutes, 90 minutes and two hours late for work these three days. On April 4 and 13, she left work at 9:00 a.m. instead of working until

2:00 p.m. On April 21, 2004, the employer warned the claimant her job was in jeopardy if she did not start reporting to work on time and did not work until the end of her shift.

On April 25, the claimant reported to work 90 minutes late. On April 26, the claimant reported to work as scheduled but left after 30 minutes because she did not feel well. On May 3, the claimant was 15 minutes late for work. On May 4, the claimant did not report to work or notify the employer she was unable to work as scheduled. On May 5, the claimant again reported to work 15 minutes late. The employer's client contacted the employer on May 5 indicating the client no longer wanted the claimant because of her repeated failure to work as scheduled. The employer told the claimant that day she was discharged because of repeated attendance problems.

The claimant established a claim for unemployment insurance benefits during the week of May 23, 2004. She filed claims for the weeks ending May 29 and June 5, 2005. The claimant received a total of \$458.00 in benefits for these weeks.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the Appeals Section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the September 28, 2004 hearing was after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

Proceeding to the substantive issues, a claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected

misconduct. Iowa Code §96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The claimant knew or should have known her job was in jeopardy after the employer talked to her about her attendance on April 21, 2004. Even after receiving the April 21 warning the claimant failed to report to work on time. She not only reported to work late by 15 to 90 minutes, but on May 4 she was absent and did not contact the employer. The claimant's repeated failure to work as scheduled without any reasonable explanation as to why she did not work as scheduled amounts to an intentional and substantial disregard of the employer's interests. The employer discharged the claimant for reasons constituting work-connected misconduct. As of May 23, 2004, the claimant is not qualified to receive benefits.

If an individual receives benefits she is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code §96.3-7. The claimant is not legally entitled to receive unemployment insurance benefits during the weeks ending May 29 and June 5, 2004. She has been overpaid a total of \$458.00 in benefits.

DECISION:

The representative's June 8, 2004 decision (reference 01) is reversed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of May 23, 2004. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits during the weeks ending May 29 and June 5, 2004. She has been overpaid a total of \$458.00 in benefits she received for these weeks.

ld/tjc