

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

DUANE A WHITIS
252 W 31ST ST
DAVENPORT IA 52803-1154

DAVENPORT COMMUNITY SCHOOL
DISTRICT
ATTN SUSAN K HERZMANN
1606 BRADY ST
DAVENPORT IA 52803

Appeal Number: 06A-UI-06066-RT
OC: 09-11-05 R: 04
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, Davenport Community School District, filed a timely appeal from an unemployment insurance decision dated June 6, 2006, reference 05, allowing unemployment insurance benefits to the claimant, Duane A. Whitis. After due notice was issued, a telephone hearing was held on June 28, 2006, with the claimant participating. Jill Cirivello, Associate Director of Human Resources, participated in the hearing for the employer. 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 as a part-time on-call substitute custodian from April 7, 2004 until he was discharged by letter dated May 9, 2006. The claimant was discharged for an incident on April 27, 2006. On that day the claimant was scheduled to work from 3:00 p.m. to 10:30 p.m. Sometime between 9:00 p.m. and 9:30 p.m., the claimant took the trash to be dumped outside the building. He accidentally locked himself out of the building while doing so. The claimant then had to walk to a gas station to attempt to call someone to let him back into the building. He tried to call Donna Mesmer, the head custodian. The claimant was unable to reach Ms. Mesmer and could not leave her a voice mail message. As the claimant was returning to the school, he saw Ms. Mesmer driving away from the school. Although the claimant tried to catch her and stop her he was unable to do so and she left. This occurred at approximately 10:15 p.m. Since the claimant had gotten a ride to work he had to wait at the school until 10:30 p.m. when his ride returned to pick him up. The claimant had no vehicle at the school. The claimant worked at the Truman Elementary School on that day and when he arrived he had no keys and there was no else present but the principal who gave the claimant his keys at approximately 5:30 p.m. While the claimant was out dumping the trash he did leave some lights on in the building.

While the claimant was out dumping the trash and then walking to the gas station to make a telephone call, Ms. Mesmer came to the school at approximately 9:30 p.m. and looked for the claimant. She could not find the claimant so believed the claimant had left work early. However, the claimant submitted a payroll report indicating that he had worked from 3:00 p.m. to 10:30 p.m. As the result of this payroll report and the employer's belief that the claimant had not worked those hours, the claimant was discharged. The claimant had received no relevant warnings or disciplines nor had he ever been accused of such behavior before. This was the only reason for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective September 11, 2005, and reopened effective May 21, 2006, the claimant has received no unemployment insurance benefits. Iowa Workforce Development records show that the claimant is ineligible to receive unemployment insurance benefits because he is, and was, not able, available, and earnestly and actively seeking work. The claimant had received unemployment insurance benefits in the amount of \$258.00 prior to his separation from the employer herein and although those benefits are not really relevant here they are now shown as overpaid. Although not relevant to the specific issues presented in this appeal, the claimant is shown as being disqualified to receive unemployment insurance benefits because he was not able and available for work because he was an on-call worker still employed as determined by a decision dated October 13, 2005 at reference 03 and further is determined to be overpaid by decision dated October 18, 2005 at reference 04 because of the able and available decision noted above. The claimant has not appealed either of these decisions.

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. As a result of his

separation from the employer herein, the claimant is not overpaid any unemployment insurance benefits.

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 testified that he was discharged on May 9, 2006. The employer's witness, Jill Cirivillo, Associate Director of Human Resources, testified that the claimant was removed from the employer's substitute custodian call list on May 9, 2006. The administrative law judge concludes that removing the claimant from the substitute custodian call list was essentially a discharge from his part-time on-call employment as a substitute custodian. Accordingly, the administrative law judge concludes that the claimant was discharged on May 9, 2006. 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. Ms. Cirivillo credibly testified that when the head custodian checked on the claimant at Truman Elementary School, where the claimant was supposed to be working on April 27, 2006, that she did not find the claimant there at approximately 9:30 p.m. although the claimant was to work until 10:30 p.m. However, the testimony of Ms. Cirivillo was hearsay and is not as credible or reliable as the testimony of the claimant who testified forthrightly and from firsthand knowledge, whenever the testimony of the two are inconsistent. The claimant credibly testified that between 9:00 p.m. and 9:30 p.m. he did leave the building to empty the trash and then accidentally locked himself out of the building and had to walk to a gas station to try to call someone to let him back into the building but he was unable to reach anyone on the telephone. The claimant then credibly testified that he returned to the school and saw the head custodian, Donna Mesmer, just leaving the school. The claimant credibly testified that although he tried to catch Ms. Mesmer he was unable to do so before she drove off. The claimant credibly testified that he had obtained a ride to work and therefore there was no vehicle parked at the school at that time. The claimant also testified that he had to remain at the school until 10:30 p.m. when his ride came. The claimant did report hours worked for that day from 3:00 p.m. to 10:30 p.m. his ordinary shift. However, the employer believed that the claimant had not worked those hours and discharged the claimant for that reason. The claimant had never received any relevant warnings or disciplines nor had he been accused of such behavior before.

On the evidence here, the administrative law judge is constrained to conclude that the claimant was at work during the hours that he was supposed to be at work although he was not in the building for a part of that time, when Ms. Mesmer checked on him, through an error of carelessness or negligence on his part when he locked himself out of the building. The claimant had never received any warnings or disciplines for this or similar behavior. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence of any deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that evince a willful or wanton disregard of the employer's interests or that are carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, at most, the evidence here indicates that the claimant's acts were ordinary negligence in an isolated instance and are not disqualifying misconduct.

In summary, and for all of the reasons set out above, 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.

Whether the claimant is otherwise eligible may be an issue here. As set out in the Findings of Fact there was a decision dated October 13, 2005, at reference 03, determining that the claimant was not eligible to receive unemployment insurance benefits because he was not able and available for work being an on-call worker who was still employed. That decision seems to have been applied to his reopened claim for unemployment insurance benefits reopened effective May 21, 2006. The claimant was then determined to be overpaid unemployment

insurance benefits in the amount of \$253.00 by decision dated October 18, 2005, reference 04, because of the able and available decision. Those decisions and the issues they raise are not before the administrative law judge. The claimant should contact his local Workforce Development office to inquire further into those decisions and whether those decisions, especially the able and available decision dated October 13, 2005, at reference 03, are still applicable now that he has been permanently separated from his employment. The administrative law judge reaches no conclusion on those decisions or the issues raised by those decisions.

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 \$258.00 before separating from the employer herein. After separating from the employer herein on or about May 9, 2006 and reopening his claim for benefits effective May 21, 2006, the claimant has received no unemployment insurance benefits. Since the claimant has received no unemployment insurance benefits since reopening his claim for benefits effective May 21, 2006, the claimant is not overpaid any such benefits and further would not be overpaid any such benefits as a result of his permanent separation from the employer herein. The administrative law judge reaches no conclusion as to whether the claimant is overpaid unemployment insurance benefits in the amount of \$258.00 for benefits received prior to his separation from the employer herein.

DECISION:

The representative's decision of June 6 2006, reference 05, is affirmed. The claimant, Duane A. Whitis, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. The administrative law judge cannot determine whether the claimant is otherwise entitled to receive unemployment insurance benefits because of prior decisions denying the claimant benefits from which the claimant has not appealed. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation and after his separation on May 9, 2006. The administrative law judge concludes that the claimant has received no unemployment insurance benefits since reopening his claim for unemployment insurance benefits effective May 21, 2006. However, Workforce Development records indicate that the

claimant is overpaid unemployment insurance benefits in the amount of \$258.00 for benefits received prior to his separation from the employer herein and prior to reopening his claim. The administrative law judge reaches no conclusion as to whether the claimant is, in fact, overpaid these benefits.

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