

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

VERONICA S BLANCH  
501 - 7<sup>TH</sup> AVE  
ROCK ISLAND IL 61201-8208

APAC CUSTOMER SERVICES OF IOWA  
LLC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-05785-RT  
OC: 05-07-06 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(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, APAC Customer Services of Iowa LLC, filed a timely appeal from an unemployment insurance decision dated May 23, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Veronica S. Blanch. After due notice was issued, a telephone hearing was held on June 21, 2006, with the claimant participating. Turkessa Hill, Benefits Administrator, 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 part time customer service representative (CSR) from August 16, 2004 until she was discharged on May 4, 2006. The claimant averaged between 25 and 36 hours per week. The claimant was discharged for making threats of violence in the workplace. On May 4, 2006, as the claimant was entering the employer's parking lot she almost collided with the car operated by another employee. The claimant was in the correct lane but the other employee made a wide turn and almost hit the claimant. The claimant went ahead and parked her car. The other employee approached the claimant and confronted her and told the claimant that she needed "to learn how to drive bitch." The claimant did not respond but kept walking into the building. As the two were walking into the building the other employee kept "badgering" the claimant mumbling to her about the incident in the parking lot. The other employee would not stop mumbling to the claimant. Eventually the claimant said "excuse me, do you really want to fight, I'll whip your ass." The other employee did not respond. The claimant was then discharged for this incident. The claimant had never received any relevant warnings or disciplines. The claimant could have reported this incident to the employer but chose not to do so because from her observations other employees had obtained varying degrees of success reporting such behavior to the employer. The employer has a policy prohibiting threats of violence in the workplace and providing that such behavior can result in discharge on the first offense. The claimant was aware of the policy but believed that a warning should and would be given for the first offense. Pursuant to her claim for unemployment insurance benefits filed effective May 7, 2006, the claimant has received unemployment insurance benefits in the amount of \$865.00 as follows: \$74.00 for benefit week ending May 13, 2006 (earnings and vacation pay \$138.00); \$212.00 per week for three weeks from benefit week ending May 20, 2006 to benefit week ending June 3, 2006; and \$155.00 for benefit week ending June 10, 2006 (earnings \$110.00).

#### 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. She 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 agree, and the administrative law judge concludes, that the claimant was discharged on May 4, 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. The only reason for the claimant's discharge was a threat of violence given to another employee. This threat of violence emanated out of a near collision in the parking lot between the claimant and another employee. The claimant credibly testified that she was in the correct lane entering the employer's parking lot and that the other employee made a wide turn almost striking her. The claimant then credibly testified that she went ahead and parked her car and the other employee approached her and confronted her and told her she needed "to learn how to drive, bitch." The claimant further credibly testified that as she and the other employee were walking in the other employee continued to mumble to the claimant about this incident and "badgering" the claimant. The claimant finally turned to the employee and said "excuse me, do you really want to fight, I'll whip your ass." The claimant was then discharged for this statement. The claimant had never received any warnings or disciplines. The employer has a policy prohibiting threats of violence in the workplace and further providing that an employee can be discharged upon a first offense. The claimant was aware of the prohibition of the threat of violence but believed that a warning would first be issued.

On the record here, although it is a close question, in view of the circumstances in which the claimant made her threat, the administrative law judge is constrained to conclude that the claimant's threat was not a deliberate act constituting a material breach of her duties nor did it evince a willful or wanton disregard of the employer's interests nor was it carelessness or

negligence in such a degree of recurrence, so as to establish disqualifying misconduct. Rather, the administrative law judge concludes that the claimant's threat was ordinary negligence in an isolated instance. The administrative law judge in no way condones any threats of workplace violence but must conclude on the evidence here that the claimant was provoked unnecessarily. The claimant testified that the other employee approached her first and called her a "bitch" and then continued to mumble and "badger" at her as they walked into the building. This does not entirely excuse the claimant's threat but does convince the administrative law judge that the claimant's response was ordinary negligence. The claimant had never received any relevant warnings or disciplines. The testimony of the employer's witness, Turkessa Hill, Benefits Administrator, is helpful. Ms. Hill testified that she did not hear any of what the co-worker told the claimant and was merely testifying from what the co-worker told her he said. However, Ms. Hill would not even divulge the name of the co-worker. This casts doubt on the credibility of the hearsay testimony of Ms. Hill.

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, she 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 her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she 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 \$865.00 since separating from the employer herein on or about May 4, 2006 and filing for such benefits effective May 7, 2006. 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 May 23, 2006, reference 01, is affirmed. The claimant, Veronica S. Blanch, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she 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 her separation from the employer herein.

kkf/pjs