

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

TRACY L GANOE
18 E CENTRAL LT 61
JEFFERSON IA 50129

KUM & GO LC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06O-UI-03109-JTT
OC: 12/04/05 R: 01
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

STATEMENT OF THE CASE:

Kum & Go filed a timely appeal from the December 30, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 6, 2006. Claimant Tracy Ganoë participated. General Manager Veronica Clipperton represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tracy Ganoë was employed by Kum & Go as a full-time sales manager at the employer's convenience store in Jefferson from August 2000 until December 2, 2005, when General Manager Veronica Clipperton discharged her for being absent without notifying the employer. Ms. Clipperton was aware that Ms. Ganoë had been experiencing difficulty with her husband and was staying with her sister, Carrie Taylor. Ms. Taylor also worked at the convenience

store. On December 1, Ms. Ganoe asked her sister to work for her the next day. Ms. Taylor agreed to work Ms. Ganoe's shift and alerted Ms. Clipperton that Ms. Ganoe had asked Ms. Taylor to substitute on December 2. After Ms. Clipperton spoke with Ms. Taylor, she telephoned Ms. Ganoe to ask whether Ms. Ganoe intended to appear for work the next day. Ms. Ganoe indicated she would.

On December 2, Ms. Ganoe did not appear for work, but her sister appeared in her stead. Ms. Clipperton told Ms. Ganoe's sister that Ms. Ganoe was discharged for not coming to work after telling Ms. Clipperton she would. Ms. Ganoe had no prior unexcused absences and had not received any reprimands for attendance. On December 2, Ms. Ganoe went to the convenience store to collect her paycheck. Ms. Ganoe looked at the schedule and observed that she had been taken off the schedule for the remainder of the week and had been given no hours on the schedule posted for the next week.

The employer had no formal attendance policy. If an employee needed to be absent, Ms. Clipperton expected the employee to arrange a substitute and seek approval from Ms. Clipperton for the absence.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Ganoe was discharged for misconduct in connection with the employment. It does 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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Ganoe's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record establishes that Ms. Ganoe had a single unexcused absence. The absence was unexcused because Ms. Ganoe had not properly notified the employer that she would be absent. This single unexcused absence did not constitute misconduct that would disqualify Ms. Ganoe for unemployment insurance benefits. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ganoe was discharged for no disqualifying reason. Accordingly, Ms. Ganoe is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Ganoe.

DECISION:

The Agency representative's decision dated December 30, 2005, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/tjc