

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

CAROL R MARCUS  
PO BOX 544  
ZWINGLE IA 52079

DUBUQUE HOLY FAMILY CATHOLIC  
ATTN MARGI PRICKETT  
532 – 42<sup>ND</sup> ST  
DES MOINES IA 50312

**AMENDED**

Appeal Number: 05A-UI-11776-HT  
OC: 10/23/05 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, 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.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Dubuque Holy Family Catholic Conference, filed an appeal from a decision dated November 9, 2005, reference 01. The decision allowed benefits to the claimant, Carol Marcus. After due notice was issued, a hearing was held by telephone conference call on December 6, 2005. The claimant participated on her own behalf and with witnesses Carol Schute, Nancy Williams, and Sandy Visintine. The employer participated by Center Director Chandra Massengale, Toddler Room Teacher Jessica Smith, and Toddler Room Aide Angelia Zozaya and was represented by Paul Janke. Exhibits One and A were admitted into the record.

#### 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: Carol Marcus was employed by Holy Family from September 25, 1995 until October 20, 2005. She was a full-time toddler room worker.

On May 2, 2005, the claimant received a written warning regarding her work performance. She had become very defiant about doing her job duties such as activity planning and carrying out the activities, communicating with other staff and having a "bad attitude" about being reminded of these things. The employer was especially concerned because new certification requirements were to go into effect in February 2006 and the center had to be in compliance. The overall format would not change, but stricter adherence to some of the activities and duties had to be met.

The claimant had, throughout her employment, showed some reluctance to do all the duties assigned to her, but the problems became more frequent and obstructive during the last six months of her employment. She was not doing the lesson plans as required and the center director took over that responsibility for a few weeks in order to show the claimant what was expected. But almost immediately after Ms. Marcus resumed responsibility for that duty, the lesson plans were not being written up or followed.

On September 22, 2005, Center Director Chandra Massengale drew up an "agreement" with the claimant about her job duties and performance expectations. The very next day the director observed the claimant's room and found the children "all just running around in the room and not doing activities." The claimant was to have split the group and have them doing activities or going on a walk, but nothing had been done.

Ms. Massengale was on vacation the week of October 11, 2005, but received reports from teacher Jessica Smith about problems with the claimant twice taking the children to another room to do art activities and failing to finish the projects because she had not secured the necessary supplies. On another day no activities had been done at all, once she let the children in before lunch was properly set up, and once the claimant said one of the children had been checked for a diaper change but Ms. Smith soon after found the diaper "soaked." Ms. Marcus was rude and "yelling" at Ms. Smith and on October 19, 2005, had not taken the children to the gym as required.

The claimant was discharged by Ms. Massengale on October 20, 2005, after she had received reports from other staff about the on-going problems with the claimant's failure to meet the requirements and expectations of her job.

Carol Marcus has received unemployment benefits since filing a claim with an effective date of October 23, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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 had been advised her job was in jeopardy as a result of her failure to perform her job duties as required. The employer went to some effort to explain the expectations, show her how things were to be done, and counsel her informally about the problems, all to no avail. While the claimant asserts she was doing the "best she could," it is evident she was resistant to some of the changes the employer was required to make to the program to acquire the necessary certification. In the past the claimant's resistance to following the lessons plans might not have been as critical as it became in 2005, but she still refused to meet those requirements when counseled to do so.

The claimant's reluctance to comply with new requirements jeopardized the employer's attempt to acquire the necessary certification and meet the government-mandated regulations. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of November 9, 2005, reference 01, is reversed. Carol Marcus is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$1,255.00.

bgh/kjw/kjw