

**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**

**CRISTINA S AGUILAR
3510 N 9TH ST #168
CARTER LAKE IA 51510**

**CON AGRA – COUNCIL BLUFFS
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-04884-RT
OC: 07-13-03 R: 01
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 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, Con Agra-Council Bluffs, filed a timely appeal from an unemployment insurance decision dated April 20, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Cristina S. Aguilar. After due notice was issued, a telephone hearing was held on May 25, 2004 with the claimant participating. Julie Millard, Human Resources Generalist, and Mona Grimshaw, Quality Assurance Supervisor, 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 full-time quality control technician from November 14, 2002 until she was discharged on April 5, 2004. The claimant was actually suspended on March 30, 2004. The claimant was suspended and then discharged for willful insubordination arising out of an incident on March 30, 2004. On that day, the claimant's supervisor, Mona Grimshaw, Quality Assurance Supervisor and one of the employer's witnesses, gave the claimant a documented conversation concerning the claimant being lax in carrying out her job duties. This was not a disciplinary action. The claimant became quite upset over this documented conversation and began to talk to other technicians about it. Ms. Grimshaw overheard the claimant talking to the other technicians and told the claimant to quit talking about it and to calm down. The claimant did not calm down but became more upset and used the term "bullshit" several times and further said she was not putting up with it. The claimant walked out of the office of Ms. Grimshaw. The claimant was later called to the human resources office and suspended pending an investigation. The employer conducted an investigation and talked to three other quality assurance technicians who all concurred that the claimant was complaining about her conversation and was quite angry. The claimant was then discharged. The employer has a rule in its employees' handbook, a copy of which the claimant received and for which he signed an acknowledgement, providing that willful insubordination is a major infraction which can result in immediate discharge and defines that as failure to follow instructions.

Pursuant to her claim for unemployment insurance benefits filed effective July 13, 2003 and reopened effective April 4, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,530.00 as follows: \$255.00 per week for six weeks from benefit week ending April 10, 2004 to benefit week ending May 15, 2004.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. 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).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The testimony of the parties is fairly similar. On March 30, 2004, the claimant's supervisor, Mona Grimshaw, Quality Assurance Supervisor and one of the employer's witnesses, gave the claimant a documented conversation about being lax in the performance of her job duties. A documented conversation is not a disciplinary action. In any event, the claimant became very upset and began talking to other quality control techs about this conversation. Ms. Grimshaw overheard the claimant and told her to quit talking about it and to calm down. The claimant did not do so but became even more upset and several times used the words "bullshit." The claimant also stated that she was not putting up with this and walked out of Ms. Grimshaw's office. Later the claimant was called to human resources and suspended pending an investigation. The employer's investigation confirmed what had occurred and the claimant was discharged on April 5, 2004. The employer has a rule in its employees' handbook providing that willful insubordination is a major infraction which can result in immediate discharge and defining it as a failure to abide by instructions from the employer. The administrative law judge, based upon the evidence here, must conclude that the claimant was willfully insubordinate on the day in question. The claimant received a documented conversation concerning her job duties. This was not a disciplinary action and the claimant was not discharged for this. This upset the claimant greatly. Even the claimant concedes that she was very upset. She began to talk about this matter with other quality assurance technicians and the claimant was instructed by Ms. Grimshaw not to do so and to calm down. The claimant did not calm down but used profanity including several times the words "bullshit." The claimant further said she was not putting up with this. The claimant failed to comply with the instructions of Ms. Grimshaw and had no real reason why she did not. The claimant testified that she was very upset but this is not a reason to react as she did. The claimant further testified that she used the words

“bullshit” two times, the last of which in the presence of Ms. Grimshaw but was walking away and seems to justify her use of the word by stating that she was walking away. The administrative law judge does not believe that this justifies the claimant’s use of profanity. The claimant disobeyed instructions from her supervisor and became more upset and used profanity.

In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals provided that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. The administrative law judge notes that the claimant received no warnings or disciplines for similar behavior and so this may have been an isolated incident but the language used by the claimant was in a confrontational and disrespectful and name-calling context and was in the presence of the target of the abusive name-calling.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that claimant’s behavior on March 30, 2004 was disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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 \$1,530.00 since separating from the employer herein on or about April 5, 2004, and reopening her claim for benefits effective April 4, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative’s decision of April 20, 2004, reference 02, is reversed. The claimant, Cristina S. Aguilar, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits. She has been overpaid unemployment insurance benefits in the amount of \$1,530.00.

tjc/b