

**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**

**RICHARD G GREGORCYK
244 TATE ST
LURAY MO 63453**

**ROQUETTE AMERICA INC
ATTN PAYROLL
1417 EXCHANGE ST
KEOKUK IA 52632-3910**

**Appeal Number: 05A-UI-03485-RT
OC: 03-06-05 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, Roquette America, Inc., filed a timely appeal from an unemployment insurance decision dated March 25, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Richard G. Gregorcyk. After due notice was issued, a telephone hearing was held on April 25, 2005, with the claimant participating. The claimant was represented by Steve Underwood, President and Union Representative for the Baker's Union Local 48-G. Sheila Humes, Labor Relations Project Coordinator, and Mark Heston, Senior Group Manager, participated in the hearing for the employer. Employer's Exhibits One Three and Four were admitted into evidence. Employer's Exhibit Two was not 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, including Employer's Exhibits One, Three and Four, but excluding Employer's Exhibit Two, the administrative law judge finds: The claimant was employed by the employer as a full time electrical control technician from July 25, 1989 until he was discharged on February 28, 2005. The claimant was discharged for allegedly misdiagnosing a problem with a motor and failing to repair or fix a starter for a motor. The claimant was also discharged for allegedly taking a screw driver and pushing it into the starter in an unsafe manner to check the starter in violation of the employer's rules and then making a false oral statement when he denied it. On February 11, 2005, the claimant was given a job to work on a pump system. He evaluated the repair work and informed the employer that he needed to call in a contractor to do the wiring. The contractor was so called in and preceded to do the wiring. That contractor then locked out the motor. The claimant is not authorized to remove the lockout system on the motor and he could not find the contractor to unlock the motor. Therefore, the claimant was unable to fix the other problem with the starter in the motor. The claimant was also called away for awhile to work on something else and when he returned he discovered that the contractor put the lock in place and the claimant was then unable to work on the starter and motor. The claimant did misdiagnose the initial problem with the starter in the motor because the meter he was using gave false readings. The claimant did not take a screw driver and push it into the starter in an unsafe manner and when he denied such an act, he did not lie or falsify a statement. Nevertheless, the claimant was discharged on February 28, 2005 as shown at Employer's Exhibit One which is a statement by Dennis Janssen, Senior Department Manager. The employer presented two hearsay statements by witnesses who alleged that the claimant pushed the screwdriver into the starter in an unsafe manner. However, those two witnesses were not called by the employer to testify personally. The claimant did receive a verbal warning in January of 2005 for misdiagnosing another problem but received no written warnings for any such behavior. The only written warning the claimant received was for playing games on a computer but this is unrelated to any reason for his discharge.

Pursuant to his claim for unemployment insurance benefits filed effective March 6, 2005 the claimant has received unemployment insurance benefits in the amount of \$702.00 as follows: \$351.00 per week for two weeks, benefit weeks ending April 9 and 16, 2005. For two weeks, benefits weeks ending March 12 and 19, 2005, the claimant is shown as being disqualified for benefits because he was not able and available to work because he was receiving vacation pay.

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. He 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 February 28, 2005. 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 employer basically provided three reasons for the claimant's discharge; failing to work on a starter on a motor when he could have and misdiagnosing the problem with the starter in the motor and then using a screwdriver in an unsafe manner to push into the starter to check the starter and then denying that he had done so which the employer alleges was a false oral statement. Concerning the failure to work on the starter and motor when he could have, the claimant credibly testified that the starter motor was part of the same system as a pump which he was initially given the assignment to work on. The claimant could not fix the pump because it needed wiring and a contractor was called. The claimant had other things to do so left for a

period of time and when he returned to work on the starter and motor, he found that the contractor had put a lock on the starter and motor and prevented the claimant from working on the starter and motor. The claimant was not authorized to work on the starter and motor when it was locked and the claimant could not find the contractor to unlock it. This testimony was not contradicted by the employer and the administrative law judge concludes that it is credible. The administrative law judge concludes that the claimant had a justification for failing to work on the starter and motor. Apparently the claimant is not being accused of anything improper in regards to the pump. Concerning the misdiagnosis of the problem with the starter and motor, the claimant admitted that he had misdiagnosed the problem because his meter gave a false reading. The employer had no evidence that such misdiagnosis was willful or deliberate. Finally, concerning the pushing of the screwdriver into the starter in an unsafe manner, the claimant credibly testified that he did not do so and therefore, any denials of such an act would not be false. The employer produced two hearsay statements to the contrary. The administrative law judge concludes that the claimant's direct testimony is credible and outweighs the two hearsay statements. Therefore, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant did push the screwdriver into the starter to check the starter in an unsafe manner and therefore, his denial as not a deliberate falsification.

On the evidence here, and as discussed above, the administrative law judge concludes that the employer has failed to demonstrate by a preponderance of the evidence any acts on the part of the claimant that were deliberate acts constituting a material breach of his duties or that evinced a willful or wanton disregard of the employer's interests or that were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge does conclude that the claimant's misdiagnosis of the problem with the motor was negligence. The claimant testified that he misdiagnosed the problem because of a false meter reading. The claimant probably could have done other things to verify the reading but did not. The issue really becomes whether this incident of negligence was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that it is not recurring negligence in such an extent that it establishes disqualifying misconduct. The claimant did concede that he had a verbal warning for misdiagnosing a problem earlier but this was just a verbal warning. The administrative law judge also notes that when he first asked the employer's witness, Sheila Humes, Labor Relations Project Coordinator, she testified that the claimant had no warnings except for a written warning for playing games with a computer which was unrelated to any matters giving rise to the claimant's discharge. It was only on cross-examination of the claimant that the claimant himself conceded that he had a verbal warning in January 2005. However, there appears to be no other verbal warnings or any other written warnings of such negligence. The administrative law judge specifically notes that the claimant was a long term employee of the employer working for the employer for almost 16 years. At most, the claimant had only two incidents of negligence apparently during those two years. Accordingly, the administrative law judge concludes that the claimant misdiagnosis of the starter motor problem was not recurring negligence as to establish disqualifying misconduct but at most was mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or ordinary negligence in an isolated instance and not disqualifying misconduct.

In summary, and for all the reasons 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.

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 \$702.00 since separating from the employer herein on or about February 28, 2005 and filing for such benefits effective March 6, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits, at least in so far as the separation from the employer is concerned.

DECISION:

The representative's decision dated March 25, 2005, reference 01, is affirmed. The claimant, Richard G. Gregorcyk, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As the result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

sc/pjs