

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

TAMMY L PETERSON  
609 HAGERMAN DR  
MUSCATINE IA 52761

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

Appeal Number: 05A-UI-04543-DWT  
OC: 02/27/05 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, 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

STATEMENT OF THE CASE:

Kum & Go LC (employer) appealed a representative's April 15, 2005 decision (reference 01) that concluded Tammy L. Peterson (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 19, 2005. The claimant participated in the hearing. Pam Fullerton, the general manager, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

#### FINDINGS OF FACT:

The claimant started working for the employer on April 27, 2004. The claimant worked part-time as a cashier. Before the claimant accepted this employment, she informed the employer about her medical issues and would need time off for medical and legal issues.

The claimant returned to work from a medical leave of absence in December 2004. The claimant was late for work on December 14 and 15. She left work early on December 16. On December 30 and January 3, the claimant was 30 minutes late for work. The claimant was over an hour late for work on January 11 and an hour late for work on January 12. On January 11, the claimant had an appointment with her attorney. On January 12, the claimant attended her child's conference. After the claimant reported to work late on January 12, Fullerton told the claimant it was not right that the claimant made other employees cover her hours. Although the claimant understood employees did not always like to cover another employee's hours, Fullerton knew when she hired the claimant the claimant would need time to go to medical appointments and meet with her attorney. The claimant had no idea her job was in jeopardy after Fullerton talked to her on January 12.

On January 14, the claimant notified the employer she was unable to work as scheduled. On January 18, the claimant worked as scheduled. The claimant had tried to find another employee to work her shift so she could see her father in Rochester, but no one agreed to work for her.

The claimant's father had serious health problems and had by-pass surgery in Rochester on January 17. The claimant wanted to go to Rochester to be with her father on January 18. The claimant was unable to leave for Rochester until her shift ended on January 18. Even though her father was not doing well after a second surgery on January 21, the claimant had an airplane ticket to get back home that day. The claimant did not arrive back to town until after her shift started.

The claimant called the employer at 4:30 a.m. on January 21 to let the employer know she could be about an hour late because she was flying home from Rochester. Even though the claimant was in Rochester when she called, the employer concluded she was not being truthful about her location. When the claimant got back to town, she called to let the employer know she had landed and was on her way to work. When the claimant called, she was late for work. The employer told her she did not need to report to work. On January 21, 2005, the employer discharged the claimant for excessive absenteeism or repeated failure to work as scheduled.

#### REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7). While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

The employer established business reasons for discharging the claimant. After the claimant came back from a medical leave, there were days she was still unable to work as scheduled. The employer and other employees got tired of covering her scheduled shifts. The employer concluded the claimant was no longer a reliable and dependable employee.

Even though the employer had justifiable reasons for discharging the claimant, the claimant's most recent absence was beyond her control. On January 12, 2005, the employer talked to the claimant about her repeated failure to work as scheduled. While the employer intended the warning to put the claimant on notice that her job was in jeopardy, the employer did not communicate this intention to the claimant.

The claimant did not ask for time off to be with her father even after he needed a second operation. Instead, she did everything she could to get to work as scheduled on January 21. When the claimant realized she might be about an hour late for work because of the airline schedule, she notified the employer from Rochester. The claimant did not commit a current act of work-connected misconduct. The claimant is qualified to receive unemployment insurance benefits as of March 27, 2005.

The employer is not one of the claimant's base period employers. During the claimant's current benefit year, the employer's account will not be charged.

#### DECISION:

The representative's April 15, 2005 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute a current act of work-connected misconduct. As of March 27, 2005, the claimant is qualified to receive unemployment insurance benefits, provided she meets all other eligibility requirements. During the claimant's current benefit year, the employer's account will not be charged.

dlw/sc