

**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**

**BERNADINE JONES
267 MADISON ST
WATERLOO IA 50703-4239**

**HEARTLAND INNS OF AMERICA LLC
D/B/A HEARTLAND INN
3136 BROCKWAY RD
WATERLOO IA 50701-5103**

**Appeal Number: 06A-UI-00802-RT
OC: 01-01-06 R: 03
Claimant: Appellant (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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Bernadine Jones, filed a timely appeal from an unemployment insurance decision dated January 19, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 7, 2006, with the claimant participating. Jean Biesk, Director of Human Resources, and Linda Gowdy, General Manager, 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 part-time housekeeper and laundry person from April 28, 2005 until she separated from her employment on December 5, 2005. On December 4, 2005, the claimant was on the schedule to work but was absent and did not notify the employer of her absence. The claimant did not work that day because she believed that she would be called off. The employer has a policy that if an employee is scheduled to work the employee must come to work unless that employee is called by the employer and informed not to come to work. In the days proceeding December 4, 2005, the claimant had been called several times not to come to work. However, on December 4, 2005, the claimant was not called by the employer but the claimant assumed she would not be working and therefore did not go to work. When the claimant came in on December 5, 2005 to get her check, the general manager, Linda Gowdy, one of the employer's witnesses, asked the claimant why she had not come to work the day before. The claimant explained that the employer had not called her to come in. Ms. Gowdy informed the claimant that the employer only called if the claimant or other employees were not needed. Ms. Gowdy then asked the claimant if there were some other problems or if her job was not working out. The claimant said that her job was not working out. Ms. Gowdy told the claimant that if she wanted to resign it might be for the best but that if she did not, she would have to talk to the director of human resources, Jean Biesk, one of the employer's witnesses. Ms. Gowdy did not tell the claimant that she was fired or discharged or that she would be fired or discharged. The claimant said it would be best if she resigned. Ms. Gowdy asked the claimant to do so in writing and the claimant did so. Ms. Gowdy did not tell the claimant what to write on her resignation. The claimant wrote on her written resignation that she was quitting because the job was "not working out at this time." The employer accepted the claimant's resignation. It is customary to refer individuals to Ms. Biesk if an individual is going to be disciplined or warned and not just discharged or fired. A referral to Ms. Biesk does not mean that the employee is going to be fired or discharged.

The claimant was absent on October 13, 2005 without notifying the employer. The claimant believed that she was sick that day. On September 4, 2005, the claimant was tardy because she did not come to work but was called by the employer and the claimant came in late. On October 8, 2005, the claimant was tardy and the employer called and the claimant came in. The claimant may have had car trouble on this occasion. The claimant received a written warning in October of 2005 for, among other things, her attendance. The only other earnings the claimant has in her base period other than the earnings from the employer herein is \$605.00 from Hy-Vee in the third quarter of 2005.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(28), (37) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(28) The claimant left after being reprimanded.

(37) The claimant will be considered to have left employment voluntarily when such claimant gave the employer notice of an intention to resign and the employer accepted such resignation. This rule shall also apply to the claimant who was employed by an educational institution who has declined or refused to accept a new contract or reasonable assurance of work for a successive academic term or year and the offer of work was within the purview of the individual's training and experience.

871 IAC 24.27 provides:

Voluntary quit of part-time employment and requalification. An individual who voluntarily quits without good cause part-time employment and has not requalified for benefits following the voluntary quit of part-time employment, yet is otherwise monetarily eligible for benefits based on wages paid by the regular or other base period employers, shall not be disqualified for voluntarily quitting the part-time employment. The individual and the part-time employer which was voluntarily quit shall be notified on the Form 65-5323 or 60-0186, Unemployment Insurance Decision, that benefit payments shall not be made which are based on the wages paid by the part-time employer and benefit charges shall not be assessed against the part-time employer's account; however, once the individual has met the requalification requirements following the voluntary quit without good cause of the part-time employer, the wages paid in the part-time employment shall be available for benefit payment purposes. For benefit charging purposes and as determined by the applicable requalification requirements, the wages paid by the part-time employer shall be transferred to the balancing account.

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).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she prepared a written resignation to that effect on December 5, 2005. The claimant maintains that she was discharged in effect because she was forced to resign on December 5, 2005. The administrative law judge concludes that there is a preponderance of the evidence that the claimant voluntarily left her employment or resigned and was not forced to quit or be discharged. Even the claimant concedes that when she met with Linda Gowdy, General Manager, on December 5, 2005 about her absence the day before, that Ms. Gowdy did not tell the claimant that she was fired or discharged or that she would be fired or discharged. All Ms. Gowdy told the claimant was that it might be best for her to resign because the claimant had stated that her job was not working out. Ms. Gowdy explained to the claimant that if she did not resign she would have to talk to Ms. Biesk but this did not mean that the claimant would be discharged. Warnings and disciplines are referred to Ms. Biesk before the employee is warned or disciplined. There is not a preponderance of the evidence that the claimant was facing an imminent discharge and that she was therefore forced to resign or be discharged. The administrative law judge notes that the claimant prepared a written resignation which was accepted by the employer. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on December 5, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment voluntarily with good cause attributable to the employer. It appears that the claimant believed that she was going to be facing some kind of discipline or reprimand and therefore quit. However, leaving work voluntarily because of a reprimand is not good cause attributable to the employer. There is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that she was subjected to a substantial change in her contract of hire. There is also no evidence that the claimant expressed any specific concerns to the employer about her working conditions prior to her quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer 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.

The administrative law judge notes that the employment from which the claimant resigned here was part-time. However, Iowa Workforce Development records show only earnings from other employers in the claimant's base period in the amount of \$605.00 from Hy-Vee in the third quarter of 2005. This is insufficient to establish that the claimant is otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers and therefore the claimant is not so entitled to benefits based upon other wages by base period employers.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for excessive unexcused absenteeism, which is disqualifying misconduct, and the claimant would still be disqualified to receive unemployment insurance benefits. The evidence establishes that the claimant was absent as a no call no show on two occasions, December 4, 2005 and October 13, 2005 and was further tardy on two occasions, September 4, 2005 and October 8, 2005. The absence on December 4, 2005 was because, although the claimant was on the schedule to work, she did not believe she would be working that day and did not come to work and did not call the employer. However, even the claimant concedes that the employer has a policy that the employer calls an employee only if the employee is not to come to work. The claimant further conceded that she was not called by the employer to not come to work. The employer also has a policy that requires that employees notify the employer if that employee is going to be absent or tardy. The claimant did not do so on December 4, 2005 nor did she do so on October 13, 2005. Further, at least one tardy occurred because the claimant did not come to work and the employer had to call the claimant and the claimant arrived late but the claimant had not notified the employer. The fourth tardy the claimant believed was for car trouble and she properly reported this but her testimony was equivocal. In any event, the administrative law judge concludes that the two absences and at least one tardy were not for reasonable cause and not properly reported and are excessive unexcused absenteeism and disqualifying misconduct. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for excessive unexcused absenteeism which is disqualifying misconduct and the claimant would still be disqualified to receive unemployment insurance benefits.

DECISION:

The representative's decision of January 19, 2006, reference 01, is affirmed. The claimant, Bernadine Jones, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer.

kkf/kjw