

**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**

**LEON W FOSTER
PO BOX 124
DES MOINES IA 50301**

**DES MOINES INDEPENDENT COMMUNITY
SCHOOL DISTRICT
ATTN BUSINESS/FINANCE
1801 – 16TH ST
DES MOINES IA 50314-1902**

**Appeal Number: 04A-UI-12068-RT
OC: 10-17-04 R: 02
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, Des Moines Independent Community School District, filed a timely appeal from an unemployment insurance decision dated November 2, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Leon W. Foster. After due notice was issued, a telephone hearing was held on November 30, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Cathy McKay, Risk Manager, participated in the hearing for the employer, Employer's Exhibit 1 was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time operations employee, most recently as a pool class III, from February 12, 1990 until he was discharged on October 14, 2004. The claimant was discharged for having in his possession copies of keys or extra keys on his key ring, which he was not supposed to have. The original keys, which the claimant duplicated, provided on their face that they were not to be duplicated. These keys allowed entrance and exit to buildings at Lincoln High School and to the kitchen area. The original keys are kept with the employees while on duty. The employer maintains a 24-hour presence at Lincoln High School, so the original keys are passed from one employee to the next as they come on duty. The claimant had no reason to get into these areas when he was not on duty and when on duty, he would have access to the original keys. The claimant was not to have these keys for his personal use. These keys were found in the claimant's possession on September 15, 2004 and the claimant admitted to having such keys. Because the possession of those keys is an offense warranting a written employee discipline, the claimant was discharged pursuant to language in a last-chance agreement signed by the claimant on August 14, 2001.

On August 14, 2001 the claimant was given a last-chance agreement, which he signed. That last-chance agreement provided that any occurrence of misconduct serious enough to result in a written employee discipline would be grounds for his discharge. The duplication and possession of the keys was such an occurrence and warranted a written employee discipline and, therefore, under the last-chance agreement, the claimant was discharged. The claimant was not discharged until October 14, 2004, when he was sent a memo of that date, as shown at Employer's Exhibit 1. The reason for the delay was that the last-chance agreement provided that discharge would be determined by the chief operating officer and it took the employer that long to get such a determination. The claimant was on a paid leave during the interim period until his discharge. The claimant received no other warnings but his performance evaluation on May 5, 2002 did indicate several areas where the claimant needed improvement. Pursuant to his claim for unemployment insurance benefits filed effective October 17, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,181.00 as follows: \$381.00 for two weeks, benefit weeks ending October 23 and 30, 2004; \$276.00 for benefit week ending November 6, 2004 (earnings \$200.00); and \$381.00 per week for three weeks from benefit week ending November 13, 2004 to benefit week ending November 27, 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. He 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 employer's witness, Cathy McKay, Risk Manager, credibly testified that the claimant was discharged on October 14, 2004, when a memo of that date was mailed to the claimant. The administrative law judge therefore concludes that the claimant was discharged on October 14, 2004.

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. Ms. McKay credibly testified that the claimant was on a last-chance agreement, which he signed on August 15, 2001. That last-chance agreement provided that any occurrence of misconduct serious enough to result in a written employee discipline would be grounds for discharge. Ms. McKay further credibly testified that on September 15, 2004 the claimant was found in possession of extra keys, which he had duplicated and which he was not supposed to have duplicated, and which he was not supposed to have in his personal possession for personal use. The original keys stated on them that they were not to be duplicated. Nevertheless, the claimant duplicated them and kept them on his key ring. These keys allowed the claimant to gain entrance to and exit the buildings at Lincoln High School as well as the kitchen area. The original keys were available to the claimant while on duty. The employer maintains a 24-hour presence at Lincoln High School and the original keys are to be passed from one employee to the next as they work their shifts. The claimant had no reason to gain

entrance to the areas provided by the keys in question when he was off duty. The claimant admitted to these matters. Accordingly, the claimant was discharged.

Because of the last-chance agreement and the claimant's violation of the employer's rules by duplicating keys that were not for duplication and then keeping the duplicated keys, the administrative law judge concludes the claimant's acts were a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of an employer's interest and are, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. On the record here, the claimant's behavior was more than ordinary negligence in an isolated instance or a good faith error in judgment or discretion. The claimant, after all, was on a last-chance agreement not dissimilar to a probation, and in Warrell v Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984), the Iowa Court of Appeals provided that one in probationary status required that the employee comply with the supervisor's orders and since the employee did not, he was disqualified to receive unemployment insurance benefits. The Iowa Court of Appeals noted that the claimant in that case had long since forfeited rights that a non-probationary employee has. The administrative law judge believes that that case is relevant here. The claimant was, after all, on a last-chance agreement and he violated it.

There was a delay in the claimant's discharge of approximately one month from September 15, 2004 when the claimant was found in possession of the extra keys and his actual discharge date of October 14, 2004. The delay was as a result of a provision in the last-chance agreement that said that the chief operating officer must determine whether one is to be discharged. It took the employer that long to get such determination. The administrative law judge concludes that here, under these circumstances, the claimant was not discharged for past conduct, which cannot serve as the basis for a discharge for misconduct. See 871 IAC 24.32(8). The employer justified the delay in discharging the claimant.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until and unless he 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 \$2,181.00, since separating from the employer herein on or

about October 14, 2004, and filing for such benefits effective October 17, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated November 2, 2004, reference 01, is reversed. The claimant, Leon W. Foster, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,181.00.

b/b