

**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**

**KELLY K O'ROURKE
633 W 3RD ST
DUBUQUE IA 52001**

**AREA RESIDENTIAL CARE INC
1170 ROOSEVELT ST
DUBUQUE IA 52001-1464**

**JOHN ROSENTHAL
TEAMSTERS LOCAL #421
195 E 14TH ST
DUBUQUE IA 52001**

**Appeal Number: 05A-UI-01880-CT
OC: 01/16/05 R: 04
Claimant: Appellant (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

STATEMENT OF THE CASE:

Kelly O'Rourke filed an appeal from a representative's decision dated February 16, 2005, reference 01, which denied benefits based on her separation from Area Residential Care, Inc. After due notice was issued, a hearing was held by telephone on March 18, 2005. Ms. O'Rourke participated personally and was represented by her union representative, John Rosenthal, Teamsters Local #421. The employer participated by Cynthia Leifker, Community Services Director. Exhibits One through Seven were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. O'Rourke was employed by Area Residential Care, Inc. beginning October 18, 1999. She was last employed full time as an apartment instructor in the employer's assisted-living facility for mentally disabled individuals. She was discharged because of excessive absenteeism, conduct for which she had received several warnings.

Ms. O'Rourke's final absence was on December 31, 2004 and was due to lack of child care. The absence was properly reported. She had been notified on November 18, 2004 that any further absence before February 17, 2005 would result in termination. Ms. O'Rourke was not notified of her discharge until January 14, 2005. During the interim, she continued to perform her normal job without incident. Ms. O'Rourke had been assigned a new supervisor at the beginning of December and the supervisor was immediately made aware that Ms. O'Rourke was on attendance probation. At the time of the December 31 absence, the supervisor immediately made the community services director aware of the infraction. The community services director was also aware that Ms. O'Rourke was on probation because of her attendance and that she was subject to discharge as provided by the November 18 warning. Ms. O'Rourke's supervisor appealed the fact that Ms. O'Rourke was to be discharged and had been notified as of January 6 that the discharge was being upheld.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. O'Rourke was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer's burden included establishing that the discharge was predicated on a current act of misconduct. See 871 IAC 24.32(8).

In the case at hand, the final act which caused Ms. O'Rourke's discharge occurred on December 31, 2004 but she was not notified of her discharge until January 14, 2005. Her supervisor and manager were aware on December 31 that Ms. O'Rourke had violated the terms of the November 18 probation. The evidence does not establish any reasonable cause for the delay in discharging her. The administrative law judge has considered the fact that the supervisor was attempting to appeal the requirement that Ms. O'Rourke be discharged. However, the employer still delayed over one week before discharging her after being notified on January 6 that the discharge would stand. Given the employer's delay in discharging, the administrative law judge concludes that the December 31 absence did not constitute a current act in relation to the January 14 discharge date. As such, a misconduct disqualification may not be imposed.

DECISION:

The representative's decision dated February 16, 2005, reference 01, is hereby reversed. Ms. O'Rourke was discharged by Area Residential Care, Inc. but a current act of misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/s