

**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**

**BEVERLY J WINDUST
709 ASHWORTH RD
DES MOINES IA 50265**

**WEST DES MOINES COMMUNITY
SCHOOL DISTRICT
ATTN: CHERYL HUISMAN
3550 MILLS CIVIC PKWY
WEST DES MOINES IA 50265-5556**

**JIM HAMILTON
PARALEGAL
1234 UNIVERSITY AVE STE 309
CLIVE IA 50325**

**Appeal Number: 05A-UI-07551-S2
OC: 06/12/05 R: 02
Claimant: Respondent (5)R**

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:

West Des Moines Community School District (employer) appealed a representative's July 18, 2005 decision (reference 01) that concluded Beverly Windust (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held in Des Moines, Iowa, on August 9, 2005. The claimant was represented by Jim Hamilton, Paralegal, and participated personally. The employer participated by Brenda Moorehead, Safety Training Human Resources Supervisor; Cheryl Huisman, Assistant Superintendent of Human Resources; and Richard Beechum, Transportation Supervisor.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 21, 2001, and at the end of her employment was working as a full-time bus driver/sub-utility worker.

The claimant suffered a work-related injury on August 27, 2003. The employer's workers' compensation carrier allowed the claimant benefits and scheduled all physician's appointments. She was released to return to work with restrictions on October 15, 2003. The employer did not have work to meet the claimant's restrictions. The employer instructed the claimant to use her sick leave. The claimant did not return to work.

On January 24, 2005, the employer's physician stated the claimant was not released to work until she had been seen in the Mayo Clinic. In a letter dated February 3, 2005, the workers' compensation carrier refused to authorize the claimant to be seen at the Mayo Clinic but did not schedule any other physician's appointments for the claimant.

On February 23, 2005, the employer informed the claimant she was authorized to take Family Medical Leave and she was to return to work on May 18, 2005. On February 24, 2005, the workers' compensation carrier notified their physician that the claimant had an 8 percent permanent partial disability in her right arm. No physician's appointments were made for the claimant by the carrier. On May 10, 2005, the employer sent the claimant a letter indicating she was going to be recommended to the Board of Education for separation from employment on May 16, 2005, and her employment would end on May 18, 2005. The Board met and determined to terminate the claimant prior to her date of expected return on May 18, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was 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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide any evidence of misconduct at the hearing. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The issue of whether the claimant was able and available for work is remanded for determination.

DECISION:

The representative's July 18, 2005 decision (reference 01) is modified with no effect. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible. The issue of whether the claimant was able and available for work is remanded for determination.

bas/tjc