

**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**

**WAYNE A GLENN
3170 – 190TH ST
PROLE IA 50229**

**CITY OF DES MOINES
PAYROLL DEPT – JILL VENTO
400 ROBERT D RAY DR
DES MOINES IA 50309**

**Appeal Number: 05A-UI-01090-HT
OC: 01/09/05 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 96.5-1 – Quit
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, City of Des Moines (Des Moines), filed an appeal from a decision dated January 31, 2005, reference 01. The decision allowed benefits to the claimant, Wayne Glenn. After due notice was issued a hearing was held by telephone conference call on February 16, 2005 and was concluded on March 7, 2005. The claimant participated on his own behalf. The employer participated by Human Resources Director Tom Turner and Horticulture Manager Matt Rosen. The employer was represented by Assistant City Attorney Carol Moser. Exhibits One through Six, and Exhibits A through E, were admitted into the record.

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: Wayne Glenn was employed by Des Moines from July 14, 2000 until January 4, 2005. He was a full-time horticulture technician at the softball park.

As a meeting on September 28, 2004, the claimant made various complaints regarding Supervisor Ken Trytek. He also indicated he thought city equipment was being used for private use by another supervisor. An investigation was done immediately, with Horticulture Manager Matt Rosen inspecting the personal property of one supervisor and determining no city equipment was present. In addition, complete inventory was done of equipment to determine its location. The claimant was notified of the results of the investigation in a letter dated November 10, 2004, which concluded there had been no misuse or misappropriation of city equipment.

Mr. Glenn had seen an employee assistance program counselor in September 2004 for stress on the job. She had recommended he quit but he did not take her advice but consulted with the human resources department about getting more effective help. He was approved for FMLA from September 29 through October 31, 2004. Upon his return, the claimant's physician submitted a statement in which he recommended that Mr. Glenn be permitted "intermittent" FMLA, allowing him to be excused from work whenever he felt he was under too much stress. The documentation was returned by the human resources department because it did not contain sufficient information. The doctor supplied the additional information, but the employer notified the claimant he did not qualify for the intermittent FMLA because of a lack of a treatment plan. He did not pursue the matter any further.

While the claimant was on FMLA, other individuals were assigned to be the supervisor of the horticulture staff while the investigation into the claimant's accusations were investigated. Mr. Trytek continued as a lead worker but did not assign or oversee the work of the employees. When he returned the claimant was issued several disciplinary actions beginning November 10, 2004, for failing to follow procedures in reporting absences from work, and for leaving early without permission. However, the progressive disciplinary procedures had not reached the discharge stage. Mr. Glenn served a four-day suspension in December 2004 for not using the following the required reporting procedures for absences. He did not file a grievance with the union disputing the disciplinary suspension.

At the beginning of December 2004, Mr. Glenn's regular physician, a general practitioner, told him on December 1, 2004, he might want to consider other employment. At the end of December 2004, the investigation of Mr. Trytek had reached a conclusion and the employer was preparing the appropriate disciplinary action. The supervisor had known the claimant was the individual who had initiated the complaints against him. On January 3, 2005, Ken Trytek, told Mr. Glenn that the employer was "trying to fire him." Mr. Glenn was not suspicious of the supervisor's motives in telling him this and did not seek any confirmation from Mr. Rosen, or Human Resources Tom Turner. Instead, he went home and consulted with his wife and the decision was made for him to quit. He submitted a written resignation on January 4, 2005, effective immediately.

Wayne Glenn has received unemployment benefits since filing a claim with an effective date of January 9, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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(33) 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:

(33) The claimant left because such claimant felt that the job performance was not to the satisfaction of the employer; provided, the employer had not requested the claimant to leave and continued work was available.

The claimant's decision to quit was not precipitated by any disciplinary action, threats, or medical recommendation. Although all of these might have played a factor, the deciding event was his former supervisor telling him that the employer was going to try and fire him. This supervisor had been the subject of an investigation regarding his conduct and performance and he knew from the start Mr. Glenn was the one who instigated the investigation.

There is no evidence in the record that the claimant's progressive discipline had reached the point of discharge and the administrative law judge finds it strange the claimant did not find it highly suspect that Mr. Trytek would be privy to any action regarding him when the supervisor's own disciplinary action was being prepared for far more serious problems than absenteeism. The revenge motive might also be considered, a way for Mr. Trytek to "get even" with the claimant for starting the investigation against him, by making unsupported statements about his future employment.

The claimant had no reason to believe the employer was retaliating against him as his accusations were thoroughly investigated and the end result was essentially an acknowledgement that the supervisor had acted inappropriately. While he did have a recommendation from his doctor to consider other employment, the claimant declined to take that recommendation and was prepared to continue working until Mr. Trytek's comment. If the claimant chose to believe a person who had a grudge against him, and declined to check with a union representative or someone in human resources, then his decision to quit is based solely on Mr. Trytek's unfounded rumor. He quit because he believed that the employer was trying to fire him and the administrative law judge cannot conclude this constitutes good cause attributable to the employer.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of January 31, 2005, reference 01, is reversed. Wayne Glenn is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,645.00.

bgh/sc