

**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**

**JANE F HAM
103 PLUM ST
BOONE IA 50036**

**BOONE COMMUNITY SCHOOL DISTRICT
500 – 7TH ST
BOONE IA 50036-2838**

**JEAN PENDLETON
ATTORNEY AT LAW
319 – 7TH ST STE 600
DES MOINES IA 50309**

**Appeal Number: 04A-UI-10576-RT
OC: 08/29/04 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, Boone Community School District, filed a timely appeal from an unemployment insurance decision dated September 27, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Jane F. Ham. After due notice was issued, a telephone hearing was held on October 28, 2004, with the claimant participating. The claimant was represented by Jean Pendleton, Attorney at Law. Joseph Kirchoff, Superintendent of Schools; Dean Berkland, Director of Building and Grounds; and Sharon Dowd-Jasa; participated in the hearing for the employer. Dan Siders was available to testify for the employer, but not called because his testimony would have been repetitive and unnecessary. Employer's Exhibits 1, 2, and 3 were admitted into evidence and Claimant's Exhibit A, B, E, and F were admitted into evidence. Claimant's Exhibit G was not admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant. This matter was originally scheduled for a hearing on October 20, 2004 at 11:00 a.m. and rescheduled at the employer's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 through 3 and Claimant's Exhibits A, B, E, and F, but not Claimant's Exhibit G, the administrative law judge finds: The claimant was employed by the employer as a full-time custodian for approximately 14 years from August 1990 until she was discharged on August 20, 2004. The reason for the claimant's discharge was her attendance and not truthfully informing the employer of the reason for absences. The claimant had taken a few days of vacation on August 2 and 3, 2004. She was to return to work August 4, 2004. However, the claimant called her supervisor, Dean Berkland, Director of Building and Grounds and one of the employer's witnesses, and informed him that she would not be at work on August 4, 2004 because her father was having surgery out of town. The claimant was then absent on August 4, 2004. Mr. Berkland approved the absence. However, the claimant's father did not have surgery on that day. The claimant was to return to work on August 5, 2004. The claimant then called Mr. Berkland the evening of August 4, 2004 and asked for two more days off for her father. This again was approved. The claimant was then absent on August 5 and 6, 2004. However, the claimant did not see her father on either of those two days.

All of the custodians are issued radios to enable them to communicate between themselves and Mr. Berkland. On August 5, 2004, the claimant got on her radio and Mr. Berkland heard her. Mr. Berkland asked the claimant if she was at work. The claimant responded, "I don't know, am I" and she was slurring her words. Mr. Berkland then asked the claimant to call him on his office phone. The claimant did so. First, the claimant said that her father was having surgery and then she stated that she had fallen and hurt herself. Mr. Berkland asked the claimant if she had been gone the day before and she said she had fallen and hurt her back. Mr. Berkland asked the claimant if she needed a day off for her back or her fall. Mr. Berkland approved this and said that the claimant could be off on those two days. The claimant was to return to work on August 9, 2004. On that same day, August 5, 2004, early in the morning, the claimant had left four messages for Mr. Berkland on his telephone at 4:11 a.m., 5:34 a.m., 5:42 a.m., and 5:52 a.m. These messages are contained on a tape at Employer's Exhibit 3. The claimant's shift was to begin at 6:30 a.m. Because the employer was concerned after the telephone messages were received and the claimant's radio message and the telephone discussion with Mr. Berkland, the employer sent three people to the claimant's house to check on her a little before noon on August 5, 2004. Mr. Berkland, Sharon Dowd-Jasa, one of the employer's witnesses, and Dan Siders all went to the claimant's residence. They knocked on the claimant's door but no one came to the door. They then saw the claimant through a window, got her attention and she came out. The claimant was dressed in a robe. The claimant was told to take the rest of that day off and the next day, Friday, August 6, 2004 and return to work on Monday, August 9, 2004. However, the claimant was picked up by her family on August 7, 2004 and taken to Kansas City, Missouri, where she was committed at Two Rivers Hospital on August 9, 2004 for depression and alcohol abuse as shown at Claimant's Exhibit E. The claimant was discharged from Two Rivers on August 27, 2004 and returned to Boone, Iowa on August 28, 2004. The claimant then prepared an employee leave request for the period from August 9, 2004 to September 7, 2004 for personal illness and then turned it into the employer on August 30, 2004. The leave request was not, and has not been approved by the employer. The claimant was then discharged as of August 20, 2004 by letter dated August 31, 2004 as shown at Employer's Exhibit 2. The claimant had received numerous warnings and

disciplines for her attendance as shown at Employer's Exhibit 1 as well as warnings for taking vacation and then later attempting to take, in lieu of the vacation, sick leave, and for not documenting appropriately her absences or illness for sick leave.

Pursuant to her claim for unemployment insurance benefits filed effective August 29, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,790.00 as follows: \$310.00 per week for 9 weeks from benefit week ending September 11, 2004 to benefit week ending November 6, 2004. For benefit week ending September 4, 2004 the claimant received no unemployment insurance benefits being shown as disqualified for that week for not being able to work.

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. She 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, (7) provide:

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).

(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 parties testified, and the administrative law judge concludes that the claimant was discharged effective August 20, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). 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, including excessive unexcused absenteeism and tardies. The employer's witnesses credibly testified that the claimant was absent on August 4 and 5, for the purported reason of tending to her father who was supposed to be having surgery. However, the claimant's father did not have surgery and the claimant did not visit her father on either of those days. On August 5, 2004, when the employer learned from a radio discussion with the claimant as well as telephone messages left very early in the morning and a telephone call eventually with the employer, that she was not out of town visiting her father and that perhaps she may have fallen and hurt her back, the employer sent three employees to the claimant's house to check on the claimant. They found the claimant at home dressed in a robe. The claimant was then told to take another day off and return to work on August 9, 2004. The claimant never returned to work because she had been committed to a hospital for depression and alcohol abuse. The claimant had notified the employer in advance of her absences for August 4 and 5, 2004 both related to her father's surgery. However, the claimant never went to see her father and must conclude on the evidence here that the claimant's reasons for her absences at least initially given to the employer were false. The claimant's testimony to the contrary is not credible. The claimant testified that she worked on August 4, 2004, but then later testified that she was not certain. The claimant testified first that surgery was scheduled for her father but it was postponed. Then she said he was in for an examination and surgery was scheduled thereafter. When asked about other events, the claimant responded simply that it was not to her recollection or she didn't remember and she was confused about the dates. The employer's witnesses were not. The administrative law judge must conclude that any testimony of the claimant contrary to that of the employer's witnesses is simply not credible. The administrative law judge must conclude that the claimant gave false reasons to the employer for her absences. The administrative law judge would conclude that the false reasons given for her absences alone establish disqualifying misconduct but there is more.

On August 5, 2004, the claimant got on her radio which was issued by the employer to all custodial staff and when asked by Mr. Berkland if she was at work, she responded, "I don't know, am I." Mr. Berkland believed that the claimant was slurring her words and he had a hard time hearing her. There is a general range of approximately three miles for the radio. Mr. Berkland then asked the claimant to call him on the telephone. She did so and at that time, first indicated that her father was having surgery, but then said something about she had fallen and hurt her back. Earlier, the claimant had left four messages on Mr. Berkland's voice mail. The messages are contained at Employer's Exhibit 3. The messages speak for themselves,

but the administrative law judge notes that the claimant's speech seemed strained and slurred and confused. The claimant stated something about her father having surgery but that she did not know whether she could take family illness or personal illness. The claimant kept calling Mr. Berkland and leaving messages for him and asking him to call her. It is clear to the administrative law judge that the claimant was disoriented. Because of all these matters, the employer sent individuals out to the claimant's house to check on her. They knocked several times and the claimant did not answer. They finally roused the claimant when they saw her through a window. The claimant came to the door dressed in a robe. The claimant did not appear to have fallen and injured her back, but she did appear disoriented. The administrative law judge must conclude based upon all of the evidence of the claimant's actions on August 5, 2004, that the claimant was intoxicated on that day. She was intoxicated on a day when she was scheduled to work and suppose to work and had called in stating that she was going to see her father because of surgery which apparently was not even scheduled. The administrative law judge would conclude that this behavior also itself is disqualifying misconduct. The claimant's behavior on the day in question were deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct.

The administrative law judge is also constrained to conclude that claimant's absences here were not for reasonable cause or personal illness and not properly reported to the employer. The claimant falsified reasons for her absences and when finally told to return to work she did not do so and did not inform the employer that she was not coming to work on August 9, 2004. The claimant had received numerous warnings about her attendance and about the reasons given for her absences and the proper documentation for absences due to personal illness or sick leave as shown at Employer's Exhibit 1. The administrative law judge is constrained to conclude therefore that claimant's absences during this period up to August 9, 2004, were excessive unexcused absenteeism and disqualifying misconduct.

The administrative law judge notes that the claimant was committed to a hospital for depression and alcohol abuse on August 9, 2004 and was not discharged from the hospital until August 27, 2004. However, the administrative law judge concludes that the claimant was not discharged for these absences or the hospitalization but rather for her actions taken prior to her hospitalization and in particular her conduct and absences on August 4, 5, 6, 2004.

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, she is disqualified to receive unemployment insurance benefits. The administrative law judge is not without sympathy for the claimant, but must conclude, on the evidence here, that the claimant is not entitled to unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she 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 \$2,790.00 since separating from the employer herein on or about August 20, 2004 and filing for such benefits effective August 29, 2004, to which she is not entitled and for which she 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 September 27, 2004, reference 01, is reversed. The claimant, Jane F. Ham, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$2,790.00.

kjf/tjc