

**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**

**BETTY JO GRAY
2002 LOGAN APT C 7
MUSCATINE IA 52761**

**BOSTON WINDOW CLEANING INC
THE MILLARD GROUP
7301 N CICERO AVE
LINCOLNWOOD IL 60712**

**Appeal Number: 04A-UI-00362-ET
OC 11-30-03 R 04
Claimant: Respondent (1)**

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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 2, 2004, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 2, 2004. Claudine Davis, Office Manager, participated in the hearing on behalf of the employer with Paralegal Caren Korobkin. The claimant called the Appeals Section for the first time at approximately 10:20 a.m. for the 10:00 a.m. hearing but was cut off before providing her phone number. The administrative law judge waited nearly 20 minutes for her to call back but started the hearing when she failed to do so. Consequently, the claimant did not participate in the hearing and did not contact the Appeals Section again the rest of the day.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time general cleaner for Boston Window Cleaning from October 23, 2003 to November 24, 2003. The claimant was absent October 28, 29, 30 and 31, 2003, due to properly reported illness. On November 7, 2003, she was a no-call/no-show and received a verbal warning about her attendance. On November 12, 2003, she called in to report her absence but did not provide a reason for her absence. On November 13, 2003, the employer told her she was going to be written up for failing to provide a reason for her absence November 13, 2003. The claimant called the employer November 14, 2003, but again failed to provide a reason for her absence when she called in. The employer met with the claimant around November 14, 2003, and the claimant apologized for her absences and the employer agreed to allow her to stay. The employer terminated the claimant's employment November 24, 2003, because of performance problems and a conflict with her supervisor.

Because of a disqualification on another matter, the claimant has not received benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). While the claimant had four absences due to properly reported illness; was a no-call/no-show November 7, and called to report she would not be in November 12 and 14, 2003, but failed to provide a reason for those absences, the claimant apologized for her absences and the employer did not terminate her employment at that time. She did not have an absence after November 14, 2003, and as a result her attendance cannot be considered a current act of misconduct. Instead, the claimant was allowed to keep working until the employer received complaints about her cleaning and the employer learned the claimant became upset about the way her supervisor was speaking to her. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). The employer has not established intentional misconduct on the part of the claimant. Consequently, benefits are allowed.

DECISION:

The January 2, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/kjf