

**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**

**MARLENE CONNER
15 – 9TH ST SW
LEMARS IA 51031**

**GOOD SAMARITAN SOCIETY INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-03968-RT
OC: 03-07-04 R: 01
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, Good Samaritan Society, Inc., filed a timely appeal from an unemployment insurance decision dated March 26, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Marlene Conner. After due notice was issued, a telephone hearing was held on May 3, 2004 with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Corinne Johnson, Administrator; Iola Frereichs, Dietician; and Lorene Wruck, Director of Dietary Services; participated in the hearing for the employer. Employer's Exhibits 1 and 2 were

admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 and 2, the administrative law judge finds: The claimant was employed by the employer, most recently as a part-time a.m. cook or morning cook, from August 20, 1986 until she was discharged on March 8, 2004. The claimant averaged approximately 36 hours per week. The claimant was discharged for not following dietary orders for the kitchen and other difficulties with her attitude and her cooking. On March 5, 2004, the claimant failed to grind fish for those residents on a ground meat diet or a mechanical soft diet. Certain residents are placed on a mechanical soft diet requiring that all meat be ground to reduce the risk for choking. This is on a diet card and is also posted in the kitchen and is in a dietary communication book in which the claimant puts entries.

Approximately two weeks earlier the claimant had been given an oral warning by Lorene Wruck, Director of Dietary Services and one of the employer's witnesses, for failing to follow the diet card and getting upset when her failures were pointed out to her and, in particular, getting upset with a resident who pointed out such a failure as well as other matters as set out in Employer's Exhibit 1. The claimant also received an oral warning on November 11, 2003 concerning her cooking as shown at Employer's Exhibit 2. The claimant also received a final written warning on June 3, 2003 for complaints against the claimant for her attitude and, in particular, requests for nutritional needs and other matters. The claimant received a written warning on May 14, 2003 also for similar matters. On June 3, 2003, the claimant was also put on a performance improvement plan. On May 19, 2003, the claimant participated in a meeting in which the importance of mechanical soft diets was discussed.

Pursuant to her claim for unemployment insurance benefits filed effective March 7, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,332.00 as follows: \$222.00 per week for six weeks from benefit week ending March 20, 2004 to benefit week ending April 24, 2004. For benefit week ending March 13, 2004, the claimant received no benefits reporting earnings sufficient to cancel benefits for that week.

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 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).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. 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. The employer's witness, Lorene Wruck, Director of Dietary Services, credibly testified that the claimant was discharged after failing to grind fish for residents who were under a mechanical soft diet or a diet that required that all meat be ground to avoid the risk of choking. This is on a diet card and is posted in the kitchen and is also in a dietary communication book for which the claimant even places entries. This occurred slightly more than two weeks after the claimant had been given an oral warning on February 18, 2004 for the same thing as well as getting upset when such failures are pointed out and also warning the claimant about other problems with her cooking as noted at Employer's Exhibit 1. The claimant had received numerous oral and written warnings including being put on a performance improvement plan, all as set out in the findings of fact. Nevertheless, the claimant continued to make errors in her cooking in particular the failure to grind all meat for those residents with a mechanical soft diet and the claimant was discharged.

Because of the numerous warnings and other disciplines received by the claimant and the claimant's persistent failure to follow those rules and warnings culminating with her failure to properly grind meat for those residents on a mechanical soft diet on March 5, 2004, the administrative law judge concludes that claimant's behavior 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. Accordingly, 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. 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 \$1,332.00 since separating from the employer herein on or about March 8, 2004 and filing for such benefits effective March 7, 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 of Iowa law.

DECISION:

The representative's decision of March 26, 2004, reference 01, is reversed. The claimant, Marlene Conner, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits. She has been overpaid unemployment insurance benefits in the amount of \$1,332.00.

tjc/b