

**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**

**MICHAEL J WALKER
1002 S 17TH ST
COUNCIL BLUFFS IA 51501**

**FBG SERVICE CORPORATION
C/o JOHNSON AND ASSOCIATES
NOW TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007**

**Appeal Number: 05A-UI-05518-RT
OC: 05/01/05 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, FBG Service Corporation, filed a timely appeal from an unemployment insurance decision dated May 16, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Michael J. Walker. After due notice was issued, a telephone hearing was held on June 13, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he, or any of his witnesses, could be reached for the hearing, as instructed in the notice of appeal. Ruben Hernandez, Human Resources Manager, and Debra Ball, Program Manager, participated in the hearing for the employer. The employer was represented by Alyce Smolsky of Johnson and Associates,

now TALX UC eXpress. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits One through Three were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a full-time cleaning specialist from January 24, 2003, until he was discharged on April 28, 2005. At that time, the claimant was assigned to clean the kitchen at Iowa Western Community College. At the account, he was informed of his discharge. He was informed to call Human Resources, but he did not do that, but called the employer's witness, Ruben Hernandez, on April 29, 2005, who told the claimant also that he was discharged. The claimant was discharged for failing to properly clean the kitchen area at Iowa Western Community College despite numerous verbal warnings to that effect and for being unsafe or careless at work resulting in warnings dated November 24, 2004 and October 26, 2004, as shown at Employer's Exhibit One, where he hit and broke a glass panel or a table. The claimant also received a written warning on August 19, 2004, for arguing with his supervisor.

The claimant had received numerous warnings about the way he cleaned the kitchen at Iowa Western Community College. The claimant was given a check-off list to use to clean the kitchen, but did not always use it. Whenever the claimant was given a warning, his job would improve and he would clean it satisfactorily for a while but then, again, he would slack off. Finally, the kitchen manager at Iowa Western Community College called the employer on April 28, 2005, and informed the employer that if the kitchen were to be inspected by the state, that the kitchen would be closed and the employer would lose the account. The claimant was then discharged. At the time of discharge, there were food particles built up under carts. The claimant did not move the carts so he could clean underneath them and allowed food particles to build up. The floor was greasy, and the claimant did not appropriately clean the floor. There was grease accumulating around the fryers and the claimant had not cleaned them appropriately. The walls were dirty. The claimant had cleaned these areas appropriately in the past, but had failed to do so prior to his discharge despite numerous verbal warnings. The employer's witness, Debra Ball, Program Manager, gave the claimant at least six verbal warnings about cleaning the kitchen appropriately and informed him that, if he did not improve, he could be disciplined up to, and including, discharge. The claimant did not improve and, after the most recent complaint from Iowa Western Community College, and the claimant's other written warnings, he was discharged. Pursuant to his claim for unemployment insurance benefits filed effective May 1, 2005, the claimant has received unemployment insurance benefits in the amount of \$826.00 as follows: \$175.00 for benefit week ending May 7, 2005 (earnings \$29.00); \$158.00 for benefit week ending May 14, 2005 (earnings \$60.00); \$143.00 for benefit week ending May 21, 2005 (earnings \$75.00); and \$175.00 per week for two weeks from benefit week ending May 28, 2005 to benefit week ending June 4, 2005.

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. He 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).

The employer's witnesses credibly testified, and the administrative law judge concludes, that the claimant was discharged on April 28, 2005, when he was informed at the account, Iowa Western Community College, of his discharge. 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, Debra Ball, Program Manager, credibly testified that the claimant persisted in failing to clean the kitchen area at Iowa Western Community College, where he was assigned the cleaning responsibilities. He allowed food particles to build up under carts. The carts should have been moved, and could have been moved, so that the area under the carts could have been cleaned. The floor was greasy and there was grease around the fryers. The walls were dirty. The claimant had received at least six verbal warnings from Ms. Ball about cleaning this area and had even been provided a check-off list. The claimant had cleaned these areas appropriately in the past and was able to do so and capable of doing so. However, the claimant allowed the kitchen to be so

dirty that, eventually, the kitchen manager at Iowa Western Community College informed the employer that, if the state should inspect the kitchen, the state would close the kitchen and the employer would lose the account. The claimant was then discharged. The administrative law judge concludes on the record here that the claimant's persistent refusal or failure to adequately clean the kitchen, despite numerous verbal warnings and a check-off list, is a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge notes that the claimant received written warnings on October 26, 2004, and November 24, 2004, as shown at Employer's Exhibit One, for being careless and negligent in his work, breaking a glass panel on one occasion and damaging a table on another occasion. It appears to the administrative law judge that the claimant was careless and negligent at work, at the very least, and this was recurring negligence, which also affected the claimant's cleaning of the premises. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he 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 \$826.00 since separating from the employer herein on or about April 28, 2005, and filing for such benefits effective May 1, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 16, 2005, reference 01, is reversed. The claimant, Michael J. Walker, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$826.00.

kjw/pjs