

**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**

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**Appeal Number: 05A-UI-06711-RT
OC: 06-05-05 R: 04
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, Diversified Therapy Corporation, filed a timely appeal from an unemployment insurance decision dated June 17, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Alexander M. Moreno. After due notice was issued, a telephone hearing was held on July 15, 2005, with the claimant participating. Lori Louck, Program Director; Ryan Conley, Safety Director; and Marie DeSmet, Clinical Coordinator; participated in the hearing for the employer. Judy Green, Director of Human Resources at the Corporate Office, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two 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 One and Two, the administrative law judge finds: The claimant was employed by the employer, most recently, as a full-time hyperbaric safety director, from June 25, 2003, until he was discharged on May 11, 2005. The claimant was discharged for patient safety issues and, in particular, not performing his duties and not following instructions. On May 10, 2005, the employer learned that the Bio Med stickers on all patient equipment had been expired for approximately six months. It was the claimant's responsibility to see that all patient equipment was kept up to date and the Bio Med stickers current. The employer was anticipating an imminent accreditation and checked the Bio Med stickers on or about May 10, 2005, and discovered that they were all expired. To perform his responsibilities, all the claimant needs to do is contact the Bio Med Department, who then tests the equipment and puts a new sticker on. The claimant did not check the stickers and did not notify the Bio Med Department to perform tests on the equipment. The claimant did not realize that the Bio Med stickers were out of date.

The employer is required to follow National Fire Protection Association codes concerning its medical equipment and, in particular, its hyperbaric room. The hyperbaric room runs 100 percent oxygen and, according to the National Fire Protection Association, it is absolutely essential to keep the hyperbaric room free of dust. However, the claimant allowed dust to accumulate in the hyperbaric room. This was a continuing problem and the employer had informed the claimant that he needed to keep the hyperbaric room free of dust. The claimant's policy was to clean the hyperbaric room only as needed. However, because all of the fabrics used by the employer were cotton, a good deal of dust would accumulate every day. The new safety director, Ryan Conley, one of the employer's witnesses, cleans the hyperbaric room daily.

Also on May 10, 2005, the employer learned that the claimant had still not updated code policies. During the last year the claimant was instructed six or seven times to update the code policies relevant to his duties. He did not update them every time as instructed because he did not feel that it was necessary even though he was so instructed by his superiors to do so.

The claimant received a written warning on August 2, 2004, for playing computer games when there were things that he had been asked to do that had not been done. The claimant was warned that he had not done a monthly check on the fire extinguishers for approximately three months. He was also instructed at that time to update the hyperbaric education manual and perform regular dusting throughout the week and, if needed, daily. On March 1, 2005, the claimant received an oral warning with a written record warning the claimant that he had missed an entire week of checklists for the hyperbaric room. The claimant also received an oral warning with a written record on April 21, 2005, for failing to attend a safety committee meeting as well as other meetings. These warnings are shown at Employer's Exhibit One. The claimant also received an employee evaluation performed on March 25, 2005, as shown at Employer's Exhibit Two. The evaluation indicates that the claimant needs improvement in, among other things, adhering to hospital and department policy and procedure, demonstrating reliability, and performing duties willingly and with initiative. At the time of the evaluation, the claimant was informed that changes needed to be made to the hyperbaric department. Pursuant to his claim for unemployment insurance benefits filed effective June 5, 2005, the

claimant has received unemployment insurance benefits in the amount of \$1,860.00 as follows: \$310.00 per week for six weeks from benefit week ending June 11, 2005, to benefit week ending July 16, 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 parties agree, and the administrative law judge concludes, that the claimant was discharged. The parties disagree as to the date of the discharge. The employer maintains the claimant was discharged on May 11, 2005. The claimant maintains that he was discharged on May 10, 2005. Although the administrative law judge does not believe that it makes a

difference, since the claimant did not file for unemployment insurance benefits until an effective date of June 5, 2005, the administrative law judge nevertheless concludes that the claimant was discharged on May 11, 2005. 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 claimant was discharged for patient safety issues, including a failure to comply with the instructions of the employer, some of which to light on May 10, 2005. The claimant allowed the Bio Med stickers on all the patient equipment to expire. The stickers had been expired for six months. Even the claimant conceded that it was his responsibility to see that the stickers were current. All the claimant had to do to fulfill his responsibilities was to call the Bio Med Department and have them test the equipment and put on new stickers. The claimant did not do so for six months. The claimant testified that he was told by the Bio Med Department not to worry about it, that work orders would be automatically generated. However, work orders were not automatically generated. The claimant then conceded that he did not realize for six months that the Bio Med stickers were out of date. If the claimant had been properly performing his duties, he would have immediately noticed that the stickers were out of date and would have contacted the Bio Med Department. He did not do so. The employer's witnesses also testified that the claimant continually had a problem in cleaning the dust from the hyperbaric room. The evidence establishes that the employer has to follow the National Fire Protection Association code concerning fire prevention, and the code provides that it is absolutely essential that the hyperbaric room be kept free of dust for fire protection purposes. The claimant continually failed to keep the room free of dust, and this was a continuing problem. The evidence establishes that because the employer uses cotton fabrics that a good deal of lint or dust accumulates every day, but the claimant's policy was to clean the room as needed and not necessarily every day or not even necessarily every week. Finally, the claimant was discharged for failing to update code policies which he was instructed to do six or seven times throughout the last year. Even the claimant conceded that he was told to do this several times, but he did not do it every time because he did not feel that it was necessary. The employer learned about these failures when it began to prepare for an upcoming accreditation. The claimant was discharged for these matters.

The claimant received a written warning on August 2, 2004, and oral warnings with a written record on March 1, 2005, and April 21, 2005, as shown at Employer's Exhibit One, and was further reminded of some of these matters in a performance evaluation on March 25, 2005, which appears at Employer's Exhibit Two. The claimant testified that he was doing the job to the best of his ability but also conceded that he knew he was not performing his job as well as he could have. These statements are in conflict. The claimant seemed to blame some of his failure on the fact that he had not been a safety director before. However, the administrative law judge is constrained to conclude that many of the claimant's failures were simply outright violations of what he knew was his job responsibility, such as updating the Bio Med stickers and complying with the National Fire Protection Association code regarding dust in the hyperbaric room, and further, violating specific instructions of the employer to update the code policies. Accordingly, the administrative law judge concludes that the claimant's failures were deliberate acts or omissions constituting a material breach of duties or obligations arising out of his workers' contract of employment and evince a willful or wanton disregard of an employer's interests and are disqualifying misconduct for those reasons.

More compelling, the administrative law judge concludes that the claimant's failures were also carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Clearly, not checking the Bio Med stickers for six months is negligence. Further, not cleaning the hyperbaric room of dust every day is also negligence. The claimant's policy to clean as needed allows dust to accumulate causing a fire hazard, which is negligence. Failing to update code policies when specifically instructed to do so is, at the very least, negligence. The claimant received warnings about this as well as an evaluation. Accordingly, the administrative law judge concludes that the claimant's failures were also carelessness or negligence in such a degree of recurrence so as also to establish disqualifying misconduct. The administrative law judge concludes that what occurred here was far more than inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity or ordinary negligence in isolated instances. The claimant knew what his job was, was reminded to perform this job, and failed to do so, often intentionally or at the very least negligently.

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, 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 \$1,860.00 since separating from the employer herein on or about May 11, 2005, and filing for such benefits effective June 5, 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 June 17, 2005, reference 01, is reversed. The claimant, Alexander M. Moreno, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,860.00.

pjs/kjw