

**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**

**PATTY S ARREDONDO
6400 HICKMAN RD #38
WINDSOR HEIGHTS IA 50322**

**DOBBS TEMPORARY SERVICES INC
D/B/A PRO STAFF-DES MOINES
5215 N O'CONNOR BLVD #925
IRVING TX 75039**

**Appeal Number: 06A-UI-00645-RT
OC: 09-04-05 R: 02
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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Dobbs Temporary Services, Inc., doing business as Pro Staff-Des Moines, filed a timely appeal from an unemployment insurance decision dated January 10, 2006, reference 05, allowing unemployment insurance benefits to the claimant, Patty S. Arredondo. After due notice was issued, a telephone hearing was held on February 2, 2006, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the Notice of Appeal. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The administrative law judge called the claimant at the number she had previously provided at 10:00 a.m. and received a voicemail for that number. The administrative law judge left a message for the claimant that he would wait 15 minutes and if the claimant had not called and the employer had not called he would do a decision based upon the administrative file. The claimant called at 10:09 a.m. and the administrative law judge called the claimant back at 10:11 a.m. The hearing began when the record was opened at 10:12 a.m. and ended when the record was closed at 10:28 a.m. and the employer had not called during that time.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. The most recent assignment given to the claimant was with Tones that began on December 12, 2005. The assignment was for one-week full time. The claimant worked on December 12, 2005. The claimant suffers from severe migraine headaches and had such a headache on December 13, 2005. The claimant was not able to work and so notified the employer, Pro Staff, leaving a voicemail message. The claimant had no responsibilities to call the assignee, Tones. Later the claimant received a message from the employer to call and she did so. The first girl with whom the claimant spoke asked if the claimant was going to work on December 14, 2005. The claimant answered in the affirmative yes. The girl then asked the claimant to wait to speak to Betsy. The claimant did so and Betsy came on the line and "scolded" the claimant about her absences including the absence that day. Betsy asked the claimant if she was going to work the next day, December 14, 2005. The claimant assured her that she was going to. Betsy then asked the claimant about other absences at a prior assignment at ING. The claimant explained that her daughter had been involved in a car accident and that she had notified the employer that she was going to be late and then the employer had called the claimant and indicated that the claimant had been replaced at the assignment at ING. Betsy then told the claimant that she was tired of working with her and the claimant was done there. The claimant was therefore discharged. At that point the claimant became upset and called Betsy a "fucking bitch." This statement occurred after the claimant was discharged. The claimant did have other absences from assignments due to her migraine headache condition. The claimant is under a doctor's care for that condition. The claimant always notified the employer of any absence unless the claimant had a migraine headache while at work and then when she left work early she would have permission from the assignee. Pursuant to her claim for unemployment insurance benefits filed effective September 4, 2005, the claimant has received unemployment insurance benefits in the total amount of \$2,775.00. Of that amount \$1,875.00 was offset against overpayments from 2000 and 2001. Since the claimant's separation from the employer herein on or about December 13, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,467.00 as follows: \$181.00 for benefit week ending December 17, 2005 (earnings \$186.00); \$142.00 for benefit week ending December 24, 2005 (earnings \$225.00); \$294.00 for benefit week ending December 31, 2005 (\$45.00 earnings); \$142.00 for benefit week ending January 7, 2006 (earnings \$225.00); \$142.00 for benefit week ending January 14, 2006 (earnings \$225.00); \$284.00 for benefit week ending January 21, 2006 (earnings \$83.00); and \$282.00 for benefit week ending January 28, 2006 (earnings \$85.00).

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 not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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(7) provides:

(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 claimant testified, and the administrative law judge concludes, that she was discharged on December 13, 2005. 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. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See

Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including, excessive unexcused absenteeism. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence, any of which would establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences, tardies, or occasions when she left work early, on the part of the claimant, to establish excessive unexcused absenteeism and disqualifying misconduct.

The claimant testified that she was discharged following an absence on December 13, 2005 from an assignment at Tones. The claimant testified that she suffered from a severe migraine headache condition and that she had a migraine headache that day and was unable to work. The claimant testified that she notified the employer of this by voicemail. The claimant also testified that she had had prior absences from other assignments including an absence because her daughter was involved in a car accident. That absence was only going to be a tardy but when the claimant called the employer the employer told the claimant that she had been replaced and so the claimant was absent. The claimant also had other absences for migraine headaches but she always notified the employer of those absences. Accordingly, the administrative law judge concludes the claimant's absences were for reasonable cause or personal illness and properly reported and were not excessive unexcused absenteeism. The claimant did testify that after she was discharged she called Betsy a "fucking bitch." However, this occurred after the claimant was discharged and did not result in her discharge. The administrative law judge concludes that that statement should not be used in determining the claimant's unemployment insurance benefits since the claimant had already been discharged when she used those words.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

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 \$1,467.00 since separating from the employer herein on or about December 13, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits. The administrative law judge also notes that the claimant had received unemployment insurance benefits prior to her separation from the employer herein but they are not relevant here.

DECISION:

The representative's decision of January 10, 2006, reference 05, is affirmed. The claimant, Patty S. Arredondo, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

kkf/kjw