

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

MARSHA C OLERICH  
1428 – 2<sup>ND</sup> AVE S  
DENISON IA 51442

MOSAIC  
C/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-6007

JOE BASQUE  
ATTORNEY AT LAW  
STE 300  
532 – 1<sup>ST</sup> AVE  
COUNCIL BLUFFS IA 51503-0803

Appeal Number: 05A-UI-05437-LT  
OC: 04-24-05 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)

Iowa Code §96.5(2)a – Discharge/Misconduct  
Iowa Code §96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

Employer filed a timely appeal from the May 13, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 9, 2005. Claimant did participate and was represented by Joe Basque, Attorney at Law. Employer did participate through Angela Wall, Pam Geslicki, and Valerie Ipsen, and was represented by Lynn Corbeil of Johnson & Associates. Employer's Exhibits 1 and 2 were received. The affidavit of Connie Herbst was read into the record on behalf of claimant.

#### FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time direct support professional in a residential facility for mentally retarded adults at Cityview Home from 1996 through April 25, 2005, when she was discharged. Dennis South, Jim Poehlman, and Valerie Ipsen made the decision to discharge. Pam Geslicki observed on April 6, 2005, that claimant had engaged in a verbal dispute with a moderately mentally retarded client, Warren, who has a mental age at approximately a third grade level.

Pam Geslicki was present in the area where claimant was working and observed claimant's interaction with Warren, who arrived late for breakfast. Claimant called him into the medication room, gave him his medication, and told him, "You don't get breakfast because you are just lazy." Warren stated he wanted to eat cereal. Claimant said he had to have toast. He reached for the cereal and claimant said loudly with her hands on her hips, "No, I said you have to have toast." He made and ate the toast and left for work. Employer considered this an infringement on his dignity and privacy, as others overheard the encounter and clients are allowed to choose their breakfast food. She was suspended with pay on April 19 pending completion of the investigation and decision. Warren did not tell Angela Wall during the investigation that claimant called him lazy. Claimant did not have a clear recollection of the incident and said she offered him breakfast without problems.

Employer issued a final written warning on January 6, 2005, after she was observed shouting at clients. (Employer's Exhibit 1) After the warning, claimant took a training class called Valuing Others, and also talked to Ipsen, supervisor, about appropriate interaction with clients.

Melissa Houston, direct support associate, worked with Connie Herbst (who claimed to have heard the conversation between claimant and Warren) on the morning in question and they were in a bedroom with the door closed at the opposite side of the house away from the kitchen for about 15 to 20 minutes. Herbst was training Houston and they could not hear claimant or Warren. When they first arrived in the kitchen, Houston saw Warren eating toast.

Claimant's testimony in the hearing was different than the statement she made to Wall during the investigation. Staff does not wait on Warren if he is late for breakfast because part of his program is to make him prepare his own breakfast as a consequence if he is tardy for breakfast. Yet claimant claimed to have offered to help him fix oatmeal, toast or cereal. Wall did not interview Herbst because she was not in that area of the house at the time of the incident.

The claimant has received unemployment benefits since filing a claim with an effective date of April 24, 2005.

#### 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).

Given claimant's inconsistent statements to Wall in the investigation with her claims during the hearing of helping Warren get his breakfast, her testimony is less than credible. Her verbal shaming language of Warren in front of others and the argument with him about what food he could and could not eat (rather than simply making him prepare his own choice of food pursuant to the program) was a violation of the terms of the final written warning and constitutes disqualifying misconduct. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The May 13, 2005, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,408.00.

dml/kjw