

**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**

**CYNTHIA L WESTRA
213 NW COLLEGE AVE APT 1
ANKENY IA 50023-2133**

**IMAGE INC
D/B/A MOLLY MAIDS
121 SW 3RD ST
ANKENY IA 50021**

**Appeal Number: 06A-UI-01886-RT
OC: 01/29/06 R: 02
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, Image, Inc., doing business as Molly Maids, filed a timely appeal from an unemployment insurance decision dated February 14, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Cynthia L. Westra. After due notice was issued, a telephone hearing was held on March 6, 2006, 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. Tammy Huinker, Owner, participated in the hearing for the employer. 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 witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time trainee from October 14, 2005, until she was discharged on November 28, 2006. The claimant averaged 35 hours per week. The claimant was discharged for poor attendance and for violating employer's policies. The employer has a policy that provides or requires that employees who are going to be absent call before 7:45 a.m. and if no one is there leave a message and then call back later and speak to a specific person. The claimant was absent on November 28, 2005 claiming that she had hurt her wrist and left a telephone message to that effect but never called the employer back. The claimant left work early on November 16, 2005 and then was absent on November 17 and 18, 2005 for alleged personal illness. The claimant again called and left a telephone message but never called back and spoke to anyone in person. On November 14, 2005, the claimant was absent for a personal day to get married but this was excused by the employer. On November 10, 2005, the claimant was absent for personal illness and this was properly reported to the employer. On October 18, 2005, the claimant left work early with a hurt wrist and then was absent the next day October 19, 2005 with a hurt wrist. The claimant only called in and left a telephone message. The claimant had several tardies although the employer had no specific documentation. The claimant received an oral warning on October 28, 2005 for her attendance and then two written warnings for her attendance, the first on November 2, 2005 and the second on November 11, 2005. When the claimant left the message about her absence on November 28, 2005, the employer's witness, Tammy Huinker, Owner, called the claimant and told her that she was discharged.

The claimant was also discharged for violating employer's rules or policies. The employer has a rule that an employee can only use a customer's telephone to call the employer's office but the claimant used the customer's telephone on two occasions to call her boyfriend. The employer also has rules prohibiting an employee from eating, drinking or smoking in the house that they are cleaning and further taking anything from the house. The claimant ate candy belonging to a customer in the customer's house. In addition the claimant had two customer complaints. The claimant was discharged for these matters as well.

Pursuant to her claim for unemployment insurance benefits filed effective January 29, 2006, the claimant has received no unemployment insurance benefits. Workforce Development records indicate that the claimant is presently disqualified to receive unemployment insurance benefits because of a disqualifying separation as a voluntary quit from a prior employer.

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 not because she has received no such benefits.

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, (7) provide:

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).

(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 employer's witness, Tammy Huinker, Owner, credibly testified, and the administrative law judge concludes, that the claimant was discharged on November 28, 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). 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, including, excessive unexcused absenteeism. The employer gave basically two reasons for the claimant's discharge; poor attendance and violation of the employer's rules.

Concerning the claimant's attendance the claimant was absent eight times in slightly more than one month of employment. One absence was excused for a personal day for the claimant's marriage. On two occasions the claimant left work early. On the other occasions the claimant

was absent for alleged illness or injury but the claimant provided no specifics about these illnesses or injuries. The claimant did not properly report most of her absences. The employer has a rule or policy that requires that an employee who is going to be absent or tardy must call the employer before 7:45 a.m. and if no one is there can leave a message but then must call back later in the day and speak to a person. The claimant called and left messages but never called back and spoke to a particular person as was required by the employer's policies. The claimant also had two or three tardies during this period of time. The claimant received an oral warning on October 28, 2005 and two written warnings, the first on November 2, 2005, and the second on November 11, 2005. Because the claimant received numerous warnings about her attendance and because the number of absences seems excessive even for personal illness or injury and because many of the absences were not properly reported, the administrative law judge concludes the claimant's absences were not for reasonable cause or personal illness and not properly reported and were excessive unexcused absenteeism and disqualifying misconduct.

Concerning the other reason for the claimant's discharge, namely, violation of the employer's rules, Miss Huinker credibly testified that the claimant used a customer telephone to call her boyfriend when such use is prohibited except to call the employer's office. The claimant violated this rule on two occasions. The claimant also ate the candy of a customer in violation of the employer's rules prohibiting eating, drinking, and smoking in a customer's home and further prohibiting taking things from a customer. In addition, the employer had two customer complaints about the claimant. In the absence of any evidence to the contrary, the administrative law judge concludes that these violations of the employer's policies were deliberate acts 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 are disqualifying misconduct.

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, 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 no unemployment insurance benefits since separating from the employer herein on or about November 28, 2005 and filing for such benefits effective January 29, 2006. Since the claimant has received no unemployment insurance benefits she is not overpaid such benefits.

DECISION:

The representative's decision of February 14, 2006, reference 01, is reversed. The claimant, Cynthia L. Westra, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she was discharged for disqualifying misconduct. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

cs/tjc