

**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**

**IRIS W ADAMS
6251 PANORAMA DR
PANORA IA 50216**

**MAB INC
D/B/A ROOKIES
PO BOX 559
GRIMES IA 50111-0559**

**Appeal Number: 05A-UI-04687-RT
OC: 04/10/05 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, MAB, Inc., doing business as Rookies, filed a timely appeal from an unemployment insurance decision dated April 28, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Iris W. Adams. After due notice was issued, a telephone hearing was held on May 23, 2005, with the claimant participating. Mari Jo Beeler, Secretary/Treasurer; and Mark Beeler, Operations Manager and President, participated in the hearing for the employer. Employer's Exhibit One was 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 Exhibit One, the administrative law judge finds: The claimant was most recently employed by the employer as a full-time store manager from July 2003 until she was discharged on April 12, 2005. The claimant was employed at the employer's store, or location, in Grimes, Iowa. The claimant was discharged for not performing her job and not enforcing policy and not acting or doing the things necessary as a manager.

On April 12, 2005, the employer conducted a large party at its store in Grimes, Iowa, where the claimant was employed. With only one server and herself bartending for the large party, the claimant had not secured sufficient serving staff for the large party. Because other staff members were only serving other customers in the establishment, and not the large party, the persons in the large party had to wait a very long time for their food. In addition, the claimant did not help the overworked server. This was the last straw for the employer and the claimant was discharged.

Less than one week earlier, on April 7, 2005, the claimant did not go to work. The claimant spoke to Operations Manager and President Mark Beeler, a witness for the employer, and informed him that she was not coming to work that day because she was flooring her house and going to dinner. She also informed Mr. Beeler that she did not have to notify him, or anyone else, of any of her absences. Just two days before that, the claimant had been absent from a mandatory meeting because she was helping her father put new windows in his house. She called the employer and informed the employer of this.

Some time in the latter part of March, or the early part of April, Mr. Beeler had to call a meeting between the claimant and a co-worker in order for them to get along. The claimant was given a warning at that time about her relationship with co-workers. On March 20, 2005, two bartenders complained about the claimant's behavior, saying she was swearing at them. For this, she received a verbal warning that same day. The claimant did not follow the employer's policies concerning parking, training employees, or smoking; having allowed bartenders to smoke on some occasions when this was prohibited. The claimant received a verbal warning on February 26, 2005, when she was scheduled to work at 10:30 a.m., but did not show up for her shift. Mr. Beeler had to call the claimant and the claimant stated to him that she thought she was not on the schedule at the time. After the phone call from Mr. Beeler, the claimant did come in and work that afternoon.

The claimant, on occasion, had to call Mr. Beeler or the employer's other witness, Mari Jo Beeler, Secretary/Treasurer, to obtain small change for the business, even though it was the claimant's responsibility to do so. On February 16, 2005, the claimant received a verbal warning for failing to make a deposit on February 15, 2005, a Tuesday. When Ms. Beeler came to the employer's location on the morning of February 16, she observed two days of money and deposits that had not been made; for February 14 and 15, 2005. The moneys collected for February 14, 2005 should have been deposited on February 15, 2005, but they were not. There was also monies from February 15, when Ms. Beeler arrived on the morning of February 16. Deposits are supposed to be made every day, and the claimant was fully aware of this. The claimant clocked in at 8:00 a.m. on February 15, 2005 and had time to make the deposit. The claimant did have to go to a meeting at 9:00 a.m., but had time both before the meeting and after the meeting to make the deposits. The claimant's only excuse to the employer was that Tuesdays were inconvenient for her. The claimant also received two other

verbal warnings for handling money and bank deposit between January 18, 2005 and February 15, 2005.

Earlier in 2005 the claimant was allowed to take a vacation, which the claimant used to go to Hawaii, but she was due back at work January 6, 2005. The claimant did not show up for work that day nor the next day, January 7, 2005. The employer did not hear from the claimant until January 8, 2005 when she called and informed the employer that, because of weather, her flight from Hawaii had been canceled. The claimant left no date for her return. The claimant did not return to work until January 11, 2005 because she spent four days waiting for a flight. Apparently the claimant booked a flight, but not promptly, and did not want to wait or use stand-by. For this, the claimant received another verbal warning. The claimant's duties as manager are set out at Employer's Exhibit One, which are the duties the claimant herself prepared, including salaries and vacation, and the employer accepted these.

Pursuant to her claim for unemployment insurance benefits filed effective April 10, 2005, the claimant has received unemployment insurance benefits in the amount of \$930.00 as follows: \$277.00 for benefit week ending April 16, 2005 (earnings \$110.00), and \$310.00 for benefit week ending April 23, 2005 (no earnings). This amount is now shown as overpaid because the claimant received vacation pay and severance pay which she did not report to Iowa Workforce Development. Therefore, it was determined that she was not entitled to benefits for those weeks and that she was overpaid those benefits as determined by decisions dated May 5, 2005, at reference 02 and 03. For benefit week ending April 30, 2005, the claimant received no benefits, being shown as not able and available for work because of vacation pay and severance pay. The claimant then received unemployment insurance benefits in the amount of \$930.00 as follows: \$310.00 per week for three weeks, benefits weeks ending May 7, 2005 and May 21, 2005. Of that amount, however, \$587.00 was offset against the overpayment for the benefits the claimant had previously received for benefit weeks ending April 16 and 23, 2005, which were overpaid as noted above. The total benefits that the claimant has received since separating from her employment, on or about April 12, 2005, total \$930.00

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.
2. Whether the claimant is overpaid unemployment insurance benefits. She 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).

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.

About the only thing the parties agree upon, and the administrative law judge so concludes, was that the claimant was discharged on April 14, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a close question, 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 witnesses, Mari Jo Beeler, Secretary/Treasurer, and Mark Beeler, Operations Manager and President, credibly testified to numerous verbal warnings, by one or both, to the claimant for various acts by the claimant, as set out in the findings of fact. The claimant was very late in returning from the vacation because of alleged weather in Hawaii. The claimant was due back to work January 6, 2005, but did not return to work until January 11, 2005. It took the claimant at least four days to get a flight back. The administrative law judge does not believe that this is a reasonable amount of time. The claimant stated that she simply stated that she scheduled another flight. The claimant admitted that she did not try stand-by. The claimant also did not inform the employer that she was not returning to work until January 8, 2005. It is difficult for the administrative law judge to believe that the claimant necessarily had to wait four days for a return flight after her original flight was canceled by weather. It is not like the situation where the claimant did not have a flight and had to wait until a vacancy was available but the claimant had already booked a flight and it had been cancelled. It would seem to the administrative law judge that claimant could have come back much sooner, and in any

event, the claimant should have immediately called the employer when she learned she was not going to be returning to work. The claimant did not do so.

The claimant also failed to make bank deposits when necessary and required by the employer; and the claimant even concedes that she failed to do so. The claimant testified that she did not have time, but the evidence indicates that there was time. The administrative law judge notes that the claimant had received several verbal warnings about handling money and making deposits and that the claimant should have made time to make the deposit on February 15, 2005. She did not do so, and for this, she received another verbal warning. In addition, on occasion, the claimant called Mr. or Ms. Beeler to obtain small change for the business even though it was the claimant's responsibility.

The claimant also received a verbal warning for failing to show up for a shift on February 26, 2005. The evidence also establishes that the claimant did not follow the employer's policies regarding parking, training employees and allowing bartenders to smoke. The claimant also received a verbal warning for swearing at two bartenders, who later complained about the behavior. The claimant's testimony to the contrary is not credible. The claimant basically denied all of these verbal warnings and denied much of the behavior attributed to her, but even the claimant had to admit that she did not make the bank deposit, and that she had not returned from vacation when she was supposed to and had not called in a timely fashion. The claimant's denial of verbal warnings, when it appears from the evidence that she did get verbal warnings, and even her ultimate concession that she did get a couple of the verbal warnings, casts doubt on her entire testimony and credibility. Mr. Beeler even had to call a meeting between the claimant and a co-worker to get them to get along. The claimant conceded the meeting, but stated that a meeting had already been held between the two and that they had resolved the problems. However, it does not appear that they had resolved the problem, otherwise Mr. Beeler would not have called the meeting.

The claimant, rather cavalierly, missed a mandatory managers meeting on April 5, 2005 and a shift she was supposed to work on April 7, 2005, for personal reasons; the first for helping her father put new windows in his house and the second for putting flooring in her house. The administrative law judge notes that the claimant did not get permission in advance to be absent on those days, but merely called the employer and told the employer she was not coming to work on those two days. The claimant also informed Mr. Beeler that she did not have to notify him, or Ms. Beeler, about her attendance. Finally, matters came to a head on April 12, 2005, when a large party was hosted by the employer when the claimant was in charge and she had not obtained enough serving help. She did not assist the server, and thus, the individuals in the party waited a long time for their food. The claimant attempted to blame this on preparation time, and perhaps some of that can be attributed to preparation, but the bottom line is that the claimant even conceded she only had one server for the large party. At first, the claimant said she had extra staff, but apparently the extra staff was called to serve other customers in the establishment.

Under the evidence here, the administrative law judge concludes that the claimant received all of the warnings, as testified to by the employer's witnesses and as set out in the findings of fact. The administrative law judge also concludes that she did in fact commit all of violations, or offenses or acts, as charged by the employer's witnesses and as also set out in the findings of fact. The administrative law judge concludes that the cumulative effect of all of the claimant's acts, in view of the claimant's warnings, constitute carelessness or negligence on the part of the claimant in such a degree of recurrence as to establish disqualifying misconduct. Although it is a close question, the administrative law judge also concludes that the cumulative effect of these

acts establish that the claimant's acts were deliberate acts constituting a material breach of her duties and obligations arising over worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are disqualifying misconduct for those reasons as well. What occurred here was far more than mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity or ordinary negligence in an isolated instance, or even a good-faith error in judgment or discretion.

The administrative law judge also concludes that the "last straw doctrine," enunciated in Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 223, (Iowa App. 1983), applies here. That doctrine states that a relatively minor infraction, when viewed in the light of prior infractions, may evidence sufficient disregard for the employer's interests to constitute misconduct. The fact that the prior acts were remote in time from the one for which the employee was discharged, and differ in nature, does not preclude a finding of misconduct. Here, all the prior acts giving rise to the claimant's discharge were not remote in time, but all occurred in 2005. The administrative law judge also concludes that many of the acts were similar in nature having to do with violations of employer's rules. Accordingly, the administrative law judge concludes that the claimant's acts, again, were disqualifying misconduct.

The administrative law judge notes that the claimant had numerous absences, as set out in the findings of fact; including absences when she failed to return from vacation and failed to properly report them, and absences when she was either helping her father put in windows or putting in flooring in her own home. The claimant did not explain how she could not have done these at a time when she was not scheduled to work. The administrative law judge is constrained to conclude that these absences are not for reasonable cause or personal illness, and many were not properly reported when she was on vacation, and that the absences are excessive unexcused absenteeism and also disqualifying misconduct.

In summary, for all 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 unemployment insurance benefits in the amount of \$930.00 since separating from the employer herein on or about April 12, 2005 and filing for such benefits effective April 10, 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 provisions of Iowa law.

DECISION:

The representative's decision dated April 28, 2005, reference 01, is reversed. The claimant, Iris W. Adams, is not entitled to receive unemployment insurance benefits until and unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$930.00.

kjw/pjs