

**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**

**DARCY M TEEPE
2041 – 250TH ST
MILFORD IA 51351**

**TOP GRADE INC
1900 N GRAND STE E1
SPENCER IA 51301**

**Appeal Number: 05A-UI-00973-RT
OC: 12-26-04 R: 01
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, Top Grade, Inc., filed a timely appeal from an unemployment insurance decision dated January 19, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Darcy M. Teepe. After due notice was issued, a telephone hearing was held on February 14, 2005, with the claimant participating. Deb Maranell, Human Resources Manager; Wendy Whitecotton, Supervisor; and Joshua Hayden, Night Supervisor, participated in the hearing for the employer. Dan Polaschek, Site Manager, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. 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 employed by the employer as a part-time telephone sales representative from May 18, 2004 until she was discharged on December 22, 2004. The claimant averaged approximately 24 hours per week. The claimant was discharged for leaving her shift before it was over on December 22, 2004. On December 22, 2004, the claimant's shift was to be from 10:00 a.m. to 4:00 p.m. The claimant came to work early at 8:00 a.m. intending to leave at 3:00 p.m. because her daughter was getting out of school early at 2:30 p.m. Because her daughter rode the bus, the claimant believed that she could leave work at 3:00 p.m. and make it home when her daughter arrived. The claimant did not specifically tell anyone about this in advance. When the claimant, or any other employee, wanted time off prior to making up that time, the employee, including the claimant, would fill out time off forms. The claimant did so on numerous occasions as shown at Employer's Exhibit One. The claimant did not do so on this occasion because she had already made up her time. On previous occasions when the claimant had already made up her time and wanted to take time off, she did not use such a time off form but would notify her supervisor and get permission. The claimant did not specifically do so on December 22, 2004. Sometime during the day the claimant and other co-workers were talking about school being out and the need to go home early, in the presence of Wendy Whitecotton, Supervisor and one of the employer's witnesses. However, the claimant did not specifically tell Ms. Whitecotton that she was going to leave work early. Sometime shortly before 3:00 p.m., the claimant and a co-worker went to Wendy Whitecotton, Supervisor and one of the employer's witnesses, and told her that another co-worker had come to work smelling badly. Ms. Whitecotton told the claimant to find another seat and work because she was scheduled until 4:00 p.m. Ms. Whitecotton had not realized that the claimant had to leave work early. Whether the claimant at that time told Ms. Whitecotton that it did not make any difference because she was leaving work early to pick up her daughter from school and that she had made up her hours already is not certain. In any event, the claimant informed Ms. Whitecotton that she was not going to continue working. Ms. Whitecotton told the claimant to see Dan Polaschek, Site Manager. However, the claimant did not. The claimant went back to her workstation to get ready to leave and Ms. Whitecotton reported this to Mr. Polaschek. Mr. Polaschek contacted Joshua Hayden, Night Supervisor, and told him to tell the claimant and the other co-worker to find other seats. He did so and the claimant told him that she was leaving, that she had come in early and already had her hours in. Whether the claimant told Mr. Hayden that she was leaving work early because her daughter was getting out of school early is uncertain. The claimant asked Mr. Hayden what the employer was going to do, fire her? and Mr. Hayden said that it was a possibility. The claimant and Mr. Hayden often did exchange sarcasms between the two in their usual discourse. The claimant then left. Deb Maranell, Human Resources Manager, and one of the employer's witnesses, called the claimant and left a message for the claimant to call back. The claimant called and spoke to Mr. Hayden who told the claimant to call Ms. Maranell or Mr. Polaschek. The claimant called Ms. Maranell at home and was told that she was discharged. The claimant had never received any warnings or disciplines for this or similar behavior. The claimant's leaving work early had never been a problem before as noted above. Pursuant to her claim for unemployment insurance benefits filed effective December 26, 2004, the claimant has received unemployment insurance benefits in the amount of \$256.00 as follows: \$128.00 for benefit week ending January 1, 2005 and \$32.00 for benefit week ending January 29, 2005 (earnings \$128.00) and \$48.00 for two weeks, benefit week ending

February 5 and 12, 2005. For the other weeks the claimant reported earnings in a sufficient amount to cancel benefits.

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, (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 parties agree that the claimant was discharged but disagree as to the date. The employer's witnesses all testified that the incident that gave rise to the claimant's discharge and her discharge occurred on December 22, 2004. The claimant testified that she believed it was December 23, 2004. The administrative law judge concludes that the claimant was discharged on December 22, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. 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. Although it is a close question, 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. The incident giving rise to the claimant's discharge is fully set out in the Findings of Fact. The claimant left work early without specific formal permission from the employer and, as a result, was discharged. The employer's witnesses testified that the reason claimant left is because a co-worker smelled badly. The claimant testified that she left work early because her daughter was getting out of school and the claimant had made up her hours by coming in at 8:00 a.m. instead of 10:00 a.m. on the day in question. The evidence establishes that when the claimant needed to be off work and had not made up her hours, she completed a time off form as shown at Employer's Exhibit One. The evidence also establishes that when the claimant had already made up her work and needed to leave work early, she would simply tell a supervisor and get permission. On the day in question the claimant did not specifically tell a supervisor or get permission from a supervisor. The claimant testified that she and other co-workers were discussing, in the presence of Wendy Whitecotton, Supervisor, that school was getting out early and some of the workers would have to leave work early. Ms. Whitecotton does not recall this conversation but the claimant repeated it several times. The claimant conceded that she did not specifically tell Ms. Whitecotton that she had to leave work early because her daughter was getting out of school early or seek permission but the claimant believed that Ms. Whitecotton was aware of this from the conversation. The administrative law judge concludes that the conversation did occur in such form and that Ms. Whitecotton simply does not recall the conversation. The claimant testified when it came time to leave or immediately before it was time to leave, she complained to Ms. Whitecotton about a co-worker smelling badly and when Ms. Whitecotton told the claimant to find another seat, that the claimant said it did not make any difference, she had to leave anyway. The claimant testified that she fully informed Ms. Whitecotton that she had to leave work early because her daughter was getting out of school early. Ms. Whitecotton denies this. The administrative law judge is uncertain whether this actually occurred but must conclude that the employer has not proved by a preponderance of the evidence that the claimant did not inform Ms. Whitecotton at that time of the reason for her need to leave work early. Mr. Hayden then approached the claimant and told her to find another seat and the claimant told Mr. Hayden that she had come in early and had already had her hours in. Mr. Hayden concedes to this. The claimant testified that she told Mr. Hayden that she had her hours in because she had to leave work early because her daughter was getting out of school early. Mr. Hayden denies this. Again, the administrative law judge must conclude that there is not a preponderance of the evidence that the claimant did not explain to Mr. Hayden the reason why she was leaving work early. The evidence is clear that the claimant told Mr. Hayden that she was leaving work early and asked whether the employer was going to fire her and Mr. Hayden indicated that it was a possibility. The claimant testified that she was being sarcastic as she often was with Mr. Hayden. Mr. Hayden concedes that he and the claimant exchanged sarcasms but not in regards to missing work.

Under the evidence here, the administrative law judge is constrained to conclude, although it is a close question, that there is not a preponderance of the evidence that the claimant's behavior was a deliberate act or omission constituting a material breach of her duties and/or evinced a

willful or wanton disregard of the employer's interest and/or was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The evidence does indicate that when the claimant was going to have to leave work early and had not made up her hours, that she filed time off forms as shown at Employer's Exhibit One. However, the claimant credibly testified that when she had already made up her hours, she did not fill out such a time off form but rather informed her supervisor that she had made up her hours and obtained permission to leave work early. This practice seems to be confirmed by the employer's witnesses. It appears to the administrative law judge that, on the day in question, the claimant was less than forthright with the employer and her supervisors in regards to leaving work early. However, the administrative law judge concludes that the claimant did have some justifiable reasonable belief that the employer was already aware that she had to leave work early because her daughter was getting out of school early. The claimant never received any warnings or disciplines for this behavior and leaving work early had never been a problem before. Accordingly, concerning the incident on December 22, 2004, which was the only reason for the claimant's discharge, the administrative law judge is constrained to conclude that the claimant's act in leaving work early was an isolated instance of ordinary negligence and is not disqualifying misconduct. The claimant's attitude was not particularly appropriate, but again, in the absence of any other occasions of such behavior or in the absence of any warnings for such behavior, the administrative law judge must conclude that her behavior does not rise to the level of disqualifying misconduct.

In summary, and for all of 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). Although it is a close question, 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 \$256.00 since separating from the employer herein on or about December 22, 2004 and filing for such benefits effective December 26, 2004. The

administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 19, 2005, reference 01, is affirmed. The claimant, Darcy M. Teepe, 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, she is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/kjf