

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

SUSAN L GERSTENBERGER
3941 – 16TH ST
DES MOINES IA 50313

INTELISTAF HEALTHCARE INC
c/o TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

c/o TALX UCM SERVICES
P O BOX 66864
ST LOUIS MO 63166-6864

Appeal Number: 05A-UI-05917-HT
OC: 05/08/05 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
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Intelistaf Healthcare, Inc. (Intelistaf), filed an appeal from a decision dated May 23, 2005, reference 01. The decision allowed benefits to the claimant, Susan Gerstenberger. After due notice was issued a hearing was held by telephone conference call on June 22, 2005. The claimant participated on her own behalf and with witness Kristina Knox. The employer participated by Branch Manager Jody Faust.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, the administrative law judge finds: Susan Gerstenberger was employed by Intelistaf from May 26, 2004, until May 3, 2005. She was a full-time staffing coordinator.

On April 18, 2005, Ms. Gerstenberger received a final written warning for work quality. Her notes were not accurate and she was not canceling employees in a timely manner. Intelistaf provides temporary health care workers to various clients and if the client cancels a requested assignment, Intelistaf must notify its employee at least two hours before the shift was to start. Failure to do so would result in Intelistaf having to pay a "time and trouble" amount of wages to the employee whose assignment was cancelled. The warning advised her that any further incidents would lead to discharge.

Ms. Gerstenberger was on duty Saturday and Sunday, April 30 and May 1, 2005. There were two assignments that were cancelled and she failed to give adequate notice to either person. This was discovered on Monday, May 2, 2005, and Supervisor Sandy Nolte attempted to contact the claimant and have her come in to the office to discuss the matter, as she was not scheduled to work Monday and Tuesday. When she was finally able to reach Ms. Gerstenberger on May 3, 2005, she asked her to come in. The claimant said she could not and "if you're just going to fire me, go ahead and tell me now." Ms. Nolte notified the claimant she was discharged.

Susan Gerstenberger has received unemployment benefits since filing a claim with an effective date of May 8, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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).

The claimant had been advised her job was in jeopardy as a result of her failure to perform her job duties as required. The claimant obviously knew she had done something wrong during her weekend shift or she would not have been so ready to assume she was being fired. This is not an issue of being unable to perform a certain set of skills, but of following instructions, keeping notes and making telephone calls. Her failure to perform her job duties appears to be more of a matter of oversight and lack of organization which, given the number of times these errors occurred, amounts to negligence to such a degree as to be considered misconduct under the provisions of the above Administrative Code section. The claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 23, 2005, reference 01, is reversed. Susan Gerstenberger is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$2,106.00.

bgh/kjw