

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

THERESA F SEIBER
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APAC CUSTOMER SERVICES OF IOWA
C/o TALX UCM SERVICES INC
P O BOX 283
SAINT LOUIS MO 63166-0283

Appeal Number: 04A-UI-11246-S2T
OC: 09/19/04 R: 12
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 – Overpayment

STATEMENT OF THE CASE:

Theresa Seiber (claimant) appealed a representative's October 8, 2004 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with APAC Customer Services of Iowa (employer) for excessive unexcused absenteeism after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 11, 2004. The claimant participated personally. The employer was represented by David Williams, Manager of Operations, and participated by Turkessa Hill, Human Resources Coordinator; Katie Vance, Assistant Operations Manager; and Amy Allison, Team Lead.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 13, 2003, as a full-time customer service representative. The claimant received a copy of the employer's Attendance Policy and signed for its receipt on October 13, 2003.

On July 20, 2004, the claimant received a written warning for being absent due to a properly reported illness. On August 20, 2004, the claimant received a written warning for being absent due to a properly reported illness. On August 20, 2004, the employer informed the claimant in writing she had exhausted her leave time. The claimant completed the paperwork to receive Americans With Disabilities Act Leave (ADA) for absences associated only with the claimant's migraines.

The claimant was absent from work on September 21, 22 and 23, 2004, because her twelve-year-old child had a viral infection. She reported to the employer she wanted to use A.D.A. leave to stay home with the child. The employer understood the child was home because the child was suspended from school. The claimant did not ask the child's father to stay home with the child. Nor did the claimant seek any other care for the child. The employer terminated the claimant on September 23, 2004, for excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In light of good faith effort, absences due to inability to obtain childcare for sick infant, although excessive, did not constitute misconduct. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Absenteeism arising out of matters of purely personal responsibilities such as childcare and transportation are not excusable. Higgins v. Iowa Department of Job Service, 275 N.W.2d 187 (Iowa 1984).

The claimant's final absence was due to her lack of childcare, a personal issue. The childcare was for a sick twelve-year-old, not an infant. The claimant's absence from work due to lack of childcare for her sick twelve-year-old arises from a purely personal responsibility. The claimant made no attempt to seek alternative childcare. Therefore, the claimant's absence is not excusable.

The falsification of an activity log book constitutes job misconduct. Smith v. Sorensen, 222 Nebraska 599, 386 N.W.2d 5 (1986). An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's right by falsely reporting her absence as an A.D.A. absence. The claimant should have known that the leave she was granted only corresponded to her absences due to migraines. The claimant's disregard of the employer's interests is misconduct. As such she is not eligible to receive unemployment insurance 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 claimant has received benefits in the amount of \$1,121.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's October 8, 2004 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has 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 \$1,121.00.

bas/s