

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

LORI L SWINDLER
32987 – 243RD AVE
KEOKUK IA 52632

ADECCO USA INC
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12601-HT
OC: 10/24/04 R: 04
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, Adecco, filed an appeal from a decision dated November 15, 2004, reference 02. The decision allowed benefits to the claimant, Lori Swindler. After due notice was issued, a hearing was held by telephone conference call on December 16, 2004. The claimant participated on her own behalf. The employer participated by Account Manager Janelle Case and was represented by UC Express in the person of Barb Hamilton.

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: Lori Swindler was employed by Adecco from May 4 until September 30, 2004. At the time of hire she received a copy of the employer's policies and agreed to abide by them. She was assigned to Foam Fabricators.

During the course of her assignment she had been no-call/no-show to work on May 25, August 8, September 3, and September 14, 2004. She was verbally warned after the unreported absence on September 3, 2004 by Account Manager Janelle Case that she must call Adecco and report any absences.

Ms. Swindler left work early on September 28, 2004, and Foam Fabricators contacted Ms. Case to report the incident. The employer contacted the claimant who said she had to leave for "personal matters." Her daughter had run away from a foster home and she had to go look for her. Ms. Case reminded the claimant that she had to notify Adecco, and not just Foam Fabricators, when she was going to miss work. She also reminded her that her pre-approved absence for September 29, 2004, would require documentation to excuse the absence and also documentation to excuse her leaving early on September 28, 2004.

The claimant was absent on September 29, 2004, for the court date but was no-call/no-show to work on September 30, 2004, because she went out of town to pick up her son. Even though she learned of this the evening of September 29, 2004, she did not call Adecco or leave a message, and the employer learned of her absence from the client company who called to report she was not at work. Foam Fabricators then said it did not want Ms. Swindler to return.

Ms. Case called the claimant on September 30, 2004, and she agreed to come in to the Adecco office. She did not have any documentation to cover her leaving early on September 28, her absence on September 29, and her no-call/no-show on September 30, 2004. She was discharged at that time.

Lori Swindler has received unemployment benefits since filing a claim with an effective date of October 24, 2004.

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, (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 claimant had been given a copy of the employer's requirements for reporting absences but failed to abide by them, being either no-call/no-show to work or else notifying only the client company. She was warned about this and advised she must contact Adecco. In spite of the warning, the claimant was no-call/no-show to work on at least two other occasions, left early without proper notice, and failed to provide the necessary documentation to excuse her absences and leaving early. Ms. Swindler has failed to provide any adequate explanation for failing to provide at least the documents from her personal court hearing on September 29, 2004, except that it contained "too much information" she did not feel the employer should know. Nor did she provide an adequate explanation for failing to notify Adecco she would be absent on September 30, 2004, even though she knew the evening before she would miss work the next day.

Absences due to purely personal considerations are not considered excused. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). In light of the prior incidents of being no-call/no-show to work and the warnings, the administrative law judge considers her absences to be excessive and unexcused. Under the provisions of the above Administrative Code section, this is misconduct for which she 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 November 15, 2004, reference 02, is reversed. Lori Swindler 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 \$1,842.00.

bgh/b