

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

KELLY L HOFTENDER  
219 MONTGOMERY  
EAST DUBUQUE IL 61025

APAC CUSTOMER SERVICES OF IOWA  
INC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
ST LOUIS MO 63166-0283

AMENDED

Appeal Number: 05A-UI-07465-JTT  
OC: 06/19/05 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 for Misconduct  
871 IAC 24.32(7) - Excessive Unexcused Absences  
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

APAC Customer Services filed a timely appeal from the July 11, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 4, 2005. Kelly Hoftender participated. Center Business Manager Corey Nemmers represented the employer. Exhibits One through Four, and Six were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kelly Hoftender was employed by APAC Customer Services as a full-time staffing coordinator

through June 20, 2005, when Center Business Manager Corey Nemmers discharged her for excessive unexcused absences.

The employer has an attendance policy that is reviewed with employees at the time of hire. Under the policy, an employee who will be absent or late is required to contact his/her immediate supervisor at least one hour before the scheduled start of a shift. Ms. Hoftender was aware of the policy. On May 1, 2005, the employer instituted a formal written attendance policy that requires employees to notify the employer of the need to be absent, but does not specify when the notice needs to be made. Ms. Hoftender was aware of the written policy.

The final absence that prompted the discharge occurred on Friday June 17, 2005, when Ms. Hoftender failed to appear for her 8:00 a.m. to 4:00 p.m. shift. On Thursday, June 16, 2005, Ms. Hoftender had met with Mr. Nemmers to discuss her desire to no longer function as the staffing coordinator and to return to a telemarketing position. Ms. Hoftender and Mr. Nemmers agreed that Ms. Hoftender would commence the telemarketing work on Monday, June 20. They further agreed that Ms. Hoftender would not need to train her replacement on Friday, June 17. However, there was no agreement to the effect that Ms. Hoftender did not need to appear for work on Friday, June 17. On the afternoon of June 17, Ms. Hoftender telephoned coworker Angie Newman on her cell phone. Ms. Newman was at the workplace at the time and advised Ms. Hoftender that Mr. Nemmers had been curious as to where Ms. Hoftender was and did not seem to be aware that Ms. Hoftender was not to come to work that day. Ms. Newman asked Ms. Hoftender whether she wanted to speak with Mr. Nemmers. Ms. Hoftender indicated that she did not, and that Mr. Nemmers could call her.

Ms. Hoftender had previously received reprimands for unexcused absences on March 4, 2005, May 24, 2005, and June 16, 2005. Ms. Hoftender's prior absences had been as follows. On March 4 and May 24, Ms. Hoftender was tardy and did not notify the employer. On June 9, Ms. Hoftender was absent and did not notify the employer. Mr. Nemmers contacted Ms. Hoftender and reminded her that the attendance policy required her to contact the employer. On June 16, Ms. Hoftender was tardy and did not notify the employer.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Hoftender was discharged for misconduct in connection with her employment based on excessive unexcused absences. It does.

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(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.

The employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Hoftender's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that Ms. Hoftender's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence establishes that Ms. Hoftender's absence on Friday, June 17, was unexcused. Ms. Hoftender testified that Mr. Nemmers had instructed her that she did not need to report to work on Friday, June 17. The weight of the evidence indicates otherwise. The fact that the employer expected Ms. Hoftender to be at the workplace on that date was brought to Ms. Hoftender's attention when Ms. Hoftender contacted a coworker during the shift. Ms. Hoftender was given the opportunity at that time to resolve any confusion over whether she was to be at work that day and specifically declined the opportunity. Ms. Hoftender's absences on March 4, May 25, June 9, and June 16 were also unexcused absences. Most noteworthy are the three final absences within eight days. The final absence occurred just one day after Ms. Hoftender had been reprimanded for an unexcused tardiness.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Hoftender's unexcused absences were excessive, and that Ms. Hoftender was discharged for misconduct in connection with the employment. Accordingly, Ms. Hoftender is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Hoftender.

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 to which she was not entitled. These benefits must be repaid according to Iowa law.

DECISION:

The representative's decision dated July 11, reference 01, is reversed. The claimant was discharged from her employment for misconduct. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant. The claimant is overpaid \$1,860.00.

jt/kjw/tjc