

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

MINNIE B ROBINSON
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ROCKFORD IL 61104-2926

ACCESS DIRECT TELEMARKETING INC
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-0007

Appeal Number: 06A-UI-02902-S2T
OC: 02/05/06 R: 03
Claimant: Appellant (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 96.5-1-d - Voluntary Quit for Medical Reasons

STATEMENT OF THE CASE:

Minnie Robinson (claimant) appealed a representative's February 27, 2006 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she had voluntarily quit employment with Access Direct Telemarketing (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 30, 2006. The claimant participated personally. The employer was represented by Jessica Meyer, Hearings Representative, and participated by Heather Hoyt, Center Manager, and Amy Bartels, Administrative Assistant. The claimant offered one exhibit, which was marked for identification as Exhibit A. Exhibit A was received into evidence. The employer offered one exhibit, which was marked for identification as Exhibit One. Exhibit One was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on May 9, 2005, as a part-time telemarketer. The claimant was placed on bed rest by her physician from December 7, 2005, to January 7, 2006. The employer issued the claimant a leave of absence for that time. The employer told the claimant she did not have to report her absence daily.

On January 9 and 10, 2006, the claimant reported to her supervisor that she was going to have to go on bed rest again because she did not feel well. The supervisor told the claimant that when she was released from bed rest, she should provide the doctor's note to the employer. The claimant was released from bed rest and returned to work on January 25, 2006. She brought her physician's note to her supervisor. The supervisor told the claimant that she had been terminated. The supervisor told the claimant that he forgot the claimant had notified him of her absence.

The supervisor failed to notify the employer of the discussions he had with the claimant. Due to his failure, the employer terminated the claimant. The supervisor offered to see if he could have the claimant re-hired. The claimant declined because she had been terminated. The supervisor never admitted to the employer that he had forgotten about the calls.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the claimant's testimony to be more credible, because the employer did not provide the testimony of its eyewitness, the supervisor. The claimant's testimony was consistent with the information she told the fact-finding interviewer.

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 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 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).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred in January 2006. The claimant's absence does not amount to job misconduct, because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge.

The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's first-hand accounting of the facts. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which she was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's February 27, 2006 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible

bas/kjw