

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The employer is a staffing agency and the claimant was employed by the employer from August 1, 2004 as a full-time assignee in a temp-to-hire position with Electronic Data Systems until she was discharged on April 21, 2005, for poor attendance. On April 17 and 18, 2005, the claimant was absent because her car broke down and she was one hour away visiting her father. The claimant missed two days of work because of no transportation. Whether these two absences were promptly reported is uncertain. The employer has a policy, as shown at Employer's Exhibit One, requiring that employees who are to be absent call the employee's supervisor at the employer, Weststaff USA, Inc. The claimant was aware of this policy. On April 3, 2005, the claimant was absent because of childcare but this was properly reported. On February 1 and 2, 2005, the claimant was absent because of illness of a child and these two absences were properly reported. On January 21, 2005, the claimant was absent for childcare and failed to notify the employer. On January 11, 2005, the claimant was absent for personal illness and this was properly reported to the employer. The claimant had other absences, but the employer did not have record of those. The claimant received oral warnings for her attendance on January 2, 2005; February 22, 2005; April 4, 2005. The oral warning on April 4, 2005, was a final warning. Whether the claimant received a warning on January 21, 2005, is uncertain. Pursuant to her claim for unemployment insurance benefits filed effective August 14, 2005, the claimant has received unemployment insurance benefits in the amount of \$944.00 as follows: \$236.00 per week for four weeks from benefit week ending September 3, 2005, to benefit week ending September 24, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. 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).

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on April 21, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism and tardies.

The claimant had a number of absences as set out in the Findings of Fact. Of those absences, the administrative law judge is constrained to conclude that the claimant's absences on April 17 and 18, 2005, and on April 3, 2005, and January 21, 2005, were not for personal illness or reasonable cause. The claimant was absent on April 17 and 18, 2005, because her car broke down while she was visiting her father one hour away. The administrative law judge does not believe that it is reasonable to miss two full days of work for lack of transportation when one is only one hour away. The claimant also was absent on April 3, 2005, and January 21, 2005, for childcare. The administrative law judge does not believe that absences for childcare are for reasonable cause. It is the employee's responsibility to see that proper childcare is obtained. The administrative law judge does conclude that the absences on February 1 and 2, 2005, for the illness of a child, are for reasonable cause. The employer's witness, Elizabeth Conklin, On Location Supervisor, testified that the claimant did not properly report her absences on April 17 and 18, 2005, but the claimant testified otherwise. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant did not properly report those absences. However, the administrative law judge concludes that those two absences were not for reasonable cause or personal illness as noted above. The claimant did

not properly report one of the absences for childcare, on January 21, 2005. The claimant received at least three oral warnings for her attendance. The last oral warning on April 4, 2005, was a final oral warning. The administrative law judge is constrained to conclude on the record here that the claimant had four absences that were not for reasonable cause or personal illness even though they may well have been reported and, as a consequence, those absences are excessive unexcused absenteeism and disqualifying misconduct. The administrative law judge also concludes that the claimant had at least three oral warnings, the last of which was a final warning. The claimant should have been well apprised that the employer was concerned about her attendance. The claimant testified that she believed she should have gotten a written warning. The administrative law judge disagrees to the extent that the claimant was clearly put on notice that the employer was concerned about her attendance but the claimant continued to have absences.

In summary, and for all the reasons set out above, the administrative law judge concludes the claimant's absences were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$944.00 since separating from the employer herein on or about April 21, 2005 and filing for such benefits effective August 14, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 2, 2005, reference 01, is reversed. The claimant, Heather L. Arellano, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. She has been overpaid unemployment insurance benefits in the amount of \$944.00.

kkf/kjw