

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

CHAD A MODLIN
1202 FOREST
WATERLOO IA 50702

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

Appeal Number: 04A-UI-06401-H2T
OC: 05-09-04 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 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 28, 2004, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on July 6, 2004. The claimant did participate. The employer did participate through Ernie Seeman, Center Manager, and was represented by Robyn Rimington of Johnson & Associates. Department's Exhibit D-1 was received. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a telephone sales representative full time beginning May 3, 2003 through April 5, 2004 when he was discharged.

The claimant was discharged from employment due to an alleged final incident of absenteeism that occurred on April 5, 2004. The claimant was last warned on March 22, 2004, that he faced termination from employment upon another incident of unexcused absenteeism. Prior absences occurred on July 16, 2003, September 6, 2003, September 20, 2003, October 29, 2003, November 25, 2003, January 21, 2004 and March 16, 2004.

The employer has a policy that provides that absences, whether excused or not, fall off an employees record on a rolling ninety day basis. The employer cannot establish that the claimant had achieved the four occurrence points necessary for termination under its policy when he was discharged on April 5, 2004. An employer's no-fault absenteeism policy is not dispositive of the issue of qualification for unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes that personnel at the Waterloo local office could have misled the claimant into believing that he could not file his appeal at the local office. Thus, it is determined that the claimant's appeal was timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The final absence occurred on April 5, 2004 when the claimant was late to work. While the claimant clearly had other instances of absenteeism, the employer has not established that the claimant violated its attendance policy by achieving four occurrences. Since the employer cannot establish that the claimant violated the attendance policy, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The May 28, 2004, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/b