

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

TANJA E REICKS
2018 W 1ST ST
DAVENPORT IA 52802

VOLT MANAGEMENT CORPORATION
c/o TALX UC EXPRESS
PO BOX 66736
ST LOUIS MO 63166-6736

Appeal Number: 04A-UI-10670-RT
OC: 09-05-04 R: 04
Claimant: Respondent (1-R)

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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Volt Management, filed a timely appeal from an unemployment insurance decision dated September 21, 2004 reference 01, allowing unemployment insurance benefits to the claimant, Tanja E. Reicks. After due notice was issued, a telephone hearing was held on October 25, 2004, with the claimant not participating. Although the claimant had called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge tried twice to call that number at 3:01 p.m. and again at 3:03 p.m., he reached a voice mail for a "Tanja." The first time, the administrative law judge left a telephone message that he was going to proceed with the hearing and if the claimant wanted to participate she needed to call before the hearing was over and the record was closed. The record began when the hearing was opened at 3:06 p.m. and ended when the record was

closed at 3:22 p.m., and the claimant had not called during that time. Tricia Whipple, Senior Recruiter, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

At 3:23 p.m. the administrative law judge received a message that the claimant was at the number she had previously provided and the administrative law judge had twice called earlier. The administrative law judge called that number at 3:25 p.m. and again reached the same voice mail. On one last try, the administrative law judge called at 3:29 p.m. and reached the claimant. The claimant stated that she had been having troubles with her telephone but that she had been waiting for the call. When asked why the claimant had not called sooner, she stated that she believed the hearing was at 3:10 p.m. She also stated that she remembered being told by the Appeals Section staff that if she was not called, she needed to call the Appeals Section within five minutes of the time for the hearing. However, the claimant did not call until approximately 3:23 p.m. The claimant had no explanation for failing to call sooner. The claimant's telephone must have been working, at least to some extent, because she was able to call the Appeals Section and finally take a call from the administrative law judge. The administrative law judge informed the claimant that he would treat her telephone call as a request to reopen the record and reschedule the hearing made after the record had been closed and the hearing completed. The administrative law judge concludes that the claimant has not demonstrated good cause for reopening the record and rescheduling the hearing. Further, the decision herein is not adverse to the claimant. Accordingly, the claimant's request to reopen the record and reschedule the hearing is hereby denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer from July 14, 2003 until she was discharged on August 31, 2004. The employer is a temporary employment agency and at all material times hereto the claimant was assigned to a position with John Deere Health, which began when the claimant was first employed on July 14, 2003 and was to last for three years. This position was full time, requiring the claimant to work 40 hours per week. The claimant was discharged on August 31, 2004 for poor attendance. The claimant worked appropriately full time as required from July 14, 2003 until on or about July 28, 2004, when the claimant requested that she be rescheduled to work no more than 20 hours at her physician's request. The claimant provided proper medical information to the employer to determine that it was medically necessary for the claimant to have part-time hours of 20 hours per week. However, the claimant was to, each week of her employment, add five hours a week until she was back at 40 hours per week. The employer did not know the specific medical condition of the claimant or whether it was job related, but was satisfied that it was required by a medical condition and approved by her physician. The employer met with John Deere Health and worked out a schedule for the claimant, which would meet the physician's restrictions. The claimant returned to work on August 3, 2004 and worked that week, 20 hours per week. Five hours was added and for the week of August 10, 2004, the claimant worked 25 hours. Again, five hours was added, and for the week of August 17, 2004, the claimant worked 30 hours. Another five hours was added, and for the week of August 24, 2004, the claimant worked 35 hours. The claimant was then scheduled, beginning August 30, 2004, to work 40 hours. The claimant came to work on August 30, 2004, but told John Deere Health that she needed more time off and that she could not work 40 hours because of her medical condition. At that time the employer discharged the claimant. There is no evidence that the claimant did not require the time off as requested because of a medical condition. The

claimant did not quit; she was discharged. Pursuant to her claim for unemployment insurance benefits filed September 21, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,778.00 as follows: \$254.00 per week for seven weeks from benefit week ending September 11, 2004 to benefit week ending October 23, 2004.

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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not overpaid unemployment insurance benefits as a result of her separation from the employer herein.

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 employer's witness, Tricia Whipple, Senior Recruiter, credibly testified that the claimant was discharged on August 31, 2004, and the administrative law judge so concludes. 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. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The employer's witness, Tricia Whipple, Senior Recruiter, credibly testified that beginning on July 28, 2004, the claimant needed to reduce her hours to part time, working only 20 hours per week and then gradually, each week, increase her work time five hours until she reached 40 hours. Ms. Whipple further credibly testified that the employer was satisfied that there was a medical requirement for this change in her hours, although Ms. Whipple did not know the actual medical condition or whether it was job related. The employer met with the assignee, John Deere Health, and worked out a schedule of work for the claimant that would meet these restrictions. The claimant then complied and worked, as set out in the Findings of Fact, until she was required to work 40 hours per week, and on August 30, 2004, the first day she worked a full 40 hours per week, she informed John Deere Health that she would need to take more time off because of her medical condition. There was no evidence that the claimant did not need the additional time off for her medical condition. However, John Deere Health decided to discharge the claimant because it had cooperated with the claimant up to that time. On the evidence here, the administrative law judge must conclude that there is not a preponderance of the evidence that the claimant's absences or anticipated absences were not for personal illness and not properly reported. Therefore, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is and was, at relevant times, able, available, and earnestly and actively seeking work under Iowa Code section 96.5-3. That issue was not set out on the notice of appeal and telephone hearing and the administrative law judge does not have jurisdiction to decide that issue. However, matters raised during the hearing indicate that there are questions as to whether the claimant is and was able, available, and earnestly and actively seeking work. The claimant was employed for approximately one year full time and then developed a medical condition that prevented her from working full-time hours.

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 \$1,778.00 since separating from the employer herein on or about August 31, 2004 and filing for such benefits effective September 5, 2004. As a result of her separation from the employer herein, the claimant is not overpaid such benefits, but the administrative law judge reaches no conclusion as to whether the claimant may be overpaid such unemployment insurance benefits as the result of some other reason, including whether the claimant is and was able, available, and earnestly and actively seeking work. To that extent, this matter should be remanded to Claims for an investigation and determination as to whether the claimant may be overpaid such benefits for other reasons.

DECISION:

The representative's decision dated September 21, 2004, reference 01, is affirmed. The claimant, Tanja E. Reicks, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is and was able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 at relevant times and would not be ineligible to receive unemployment insurance benefits for that reason. The claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer, but this matter should be remanded to Claims for an investigation and determination as to whether the claimant might be overpaid unemployment insurance benefits because she is and was not able, available, and earnestly and actively seeking work.

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because she is and was, at relevant times, not able, available, and earnestly and actively seeking work and, further, an investigation and determination as to whether the claimant might be overpaid unemployment insurance benefits which she received during a period of time when she was not able, available, and earnestly and actively seeking work

b/kjf