

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ANNA M FARLEY
Claimant

APPEAL NO. 07A-UI-05110-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**APAC CUSTOMER SERVICES OF
IOWA LLC**
Employer

**OC: 04/22/07 R: 04
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated May 9, 2007, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on June 5, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing. Turkessa Hill participated in the hearing on behalf of the employer.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked full time for the employer as a customer service representative from March 10, 2003, to January 2, 2007. The claimant suffers from severe migraine headaches for which she has been treated by health professionals. In September, the claimant had applied for and received intermittent leave under the Family and Medical Leave Act (FMLA) for the period from September 11, 2006, to March 11, 2007, or the expiration of 444 hours of leave. The claimant used some intermittent leave due to her migraine headache condition in 2006. The claimant understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled.

After January 2, 2007, the claimant was absent from work due to severe migraines headaches that made her unable to perform her job. On the advice of her supervisor, the claimant began calling in sick everyday.

Because the claimant had exhausted the FMLA leave provided under her leave request and was off work continuously rather than intermittently, the benefits administrator, Turkessa Hill, spoke to the claimant by phone on March 23, 2007, and informed her about the exhaustion of

her approved leave. The claimant agreed to come in that day or the next day and pick up the paperwork to fill out and submit to her doctor to recertify her for additional time off.

The claimant had a migraine on March 23 and did not report to work to pick up the FMLA paperwork that day or afterward. She did not call Hill to let her know that she was not going to come in to pick up the paperwork. She called in sick daily through March 30, 2007. She stopped calling after March 30. She did not call in to report her absences on April 2, 3, 4, 5, or 6.

When the claimant failed to report to work on March 23 to pick up the paperwork or to contact Hill afterward to explain why she had not reported, Hill sent her a certified letter on April 2. The letter stated that the claimant had exhausted her FMLA, had been asked to recertify for FMLA, but Hill had not heard from her. The letter stated that if she did not contact the employer by 9:00 a.m. on April 9, it would be considered her resignation from the company. In the letter, Hill stated that if the claimant had any questions, she could contact Hill at her personal extension. The letter, which was sent on April 2, was not received by the claimant until 2:27 p.m. on April 6, 2007. The claimant did not contact anyone with the employer afterward.

On April 11, 2007, Hill sent the claimant a letter stating her employment was terminated as of April 11 because she had not contacted Hill or reported to work since the letter was sent on April 2. Before sending out the letter, Hill had asked the claimant's supervisor whether she had heard from the claimant or had any messages from her and the supervisor said no.

The claimant filed for and received a total of \$2,460.00 in unemployment insurance benefits for the weeks between April 22 and June 2, 2007.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant testified that she called Hill to say she was not coming in pick up the FMLA paperwork on March 23, had called in every morning she was absent (including April 6), and called her supervisor and the human resources director and left messages for them to call her and her calls were never returned. She had no explanation as to why she failed to call Hill when her extension was listed on the letter dated April 2, other than she freaked when she got the letter. This makes the claimant's testimony hard to believe since it was Hill that she talked to on March 23 and Hill who was requiring the recertification documentation.

Hill testified credibly and consistently. Hill had records of the claimant calling in through March 30, but not afterward. I do not believe the records were manipulated or misread by Hill. It does not appear the employer was set on get rid of the claimant because the employer did not terminate the claimant after she exhausted her FMLA and Hill could have decided on April 2 that the claimant was subject to termination due to her failure to come in to pick up the FMLA paperwork as she said would on March 23. Instead, the claimant was given more time and instructed to set up an appointment if she had any questions. The claimant argues that she did not want to lose her job, but by her own testimony was satisfied with calling her supervisor and Karen Hughes once and then assuming she was fired when she did not get a return call. This simply does not ring true.

The claimant's failure to obtain the certification necessary to continue to be off work, her failure to contact Hill, and failure to keep in contact with the employer after her extended absences were willful and material breaches of her duties and obligations to the employer and substantially disregarded the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The next issue in this case is whether the claimant was overpaid unemployment insurance 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.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits and was overpaid \$2,460.00 in unemployment insurance benefits for the weeks between April 22 and June 2, 2007.

DECISION:

The unemployment insurance decision dated May 9, 2007, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant was overpaid \$2,460.00 in unemployment insurance benefits, which must be repaid.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css