

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA VINCENT-PATTON

Claimant

APPEAL NO. 07A-UI-03937-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC

Employer

**OC: 03/18/07 R: 04
Claimant: Respondent (2)**

871 IAC 26.14(7) - Late Call
Section 17A.12-3 - Non-Appearance of Party
Section 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Access Direct Telemarketing, Inc. (employer) appealed an unemployment insurance decision dated April 9, 2007, reference 01, which held that Diana Vincent-Patton (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 2, 2007. The claimant provided a telephone number but was not available when that number was called for the hearing, and therefore, did not participate. The employer participated through Eric Rudd, Team Manager, and employer representative Ted Arndt. Employer's Exhibit One was admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

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 employed as a full-time insurance agent from February 13, 2006 through March 20, 2007, when she was discharged due to excessive unexcused absenteeism. Beginning in August 2006, the claimant received two written warnings and had been placed on probation for attendance on three separate dates. The most recent probation period began on March 6, 2007, and she was not allowed to miss any work within the following 30 days unless it was approved in advance.

At that time, she was working Mondays through Thursdays from 11:30 a.m. to 8:00 p.m. She was advised at the time of hire that her hours would vary dependent upon the program on which she was working and her success in these programs. The claimant was suspended off the insurance program on March 14, 2007, for entering incorrect disposition codes. Consequently,

her hours had to be changed to fit the hours of a different program. She was now required to work Mondays through Thursdays from 2:00 p.m. to 8:00 p.m. and Saturdays from 9:00 a.m. to 3:00 p.m. The last time she was required to work Saturdays was in October 2006, when she worked from 11:30 a.m. to 8:00 p.m.

The claimant was late for work on March 15, 2007, even though she was starting two and one half hours later than her previous schedule. She missed work on Saturday, March 17, 2007, due to lack of transportation. She was discharged on March 20, 2007, for violating the employer's attendance policy and her probation agreement.

The claimant did not participate in the hearing. The record closed at 1:22 p.m. At 1:55 p.m., the claimant called the Appeals Section and requested that the record be reopened. She provided a cell phone number and concluded that she must have been out of range when she was called for the hearing.

The claimant filed a claim for unemployment insurance benefits effective March 18, 2007, and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. If a party responds to a hearing notice after the record has been closed, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c). The request to reopen the record is denied because the party making the request was unable to participate due to her cell phone. Furthermore, if the party would have called in immediately when she had not received a call, she would have been able to participate, but she waited until 1:55 p.m. to call the Appeals Section.

The next issue to be determined is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on March 20, 2007 for excessive unexcused absenteeism.

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 employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated April 9, 2007, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,125.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw