

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HERNEIDRA S TELLERY

Claimant

APPEAL NO: 06A-UI-07990-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

APAC CUSTOMER SERVICES INC

Employer

**OC: 06-25-06 R: 12
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 27, 2006, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on August 24, 2006 and continued on September 27, 2006 to give the parties an opportunity to produce documents related to the separation and for scheduling conflicts of both parties. Claimant participated. Employer participated through Turkessa Hill. Claimant's Exhibit A was received. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time customer service representative (CSR) through June 2, 2006 when she was discharged. Her last day of work was February 18, 2006 and she was off work under the Family Medical Leave Act (FMLA) through March 20, 2006. She then had gall stone problems and the FMLA was extended for intermittent absences through May 16, 2006 although she did not report to work at all.

On May 16, 2006, she told Zach Radcliffe, Operations Manager, she would return to work on May 22 but did not return or call. Employer sent her a letter via certified mail on May 25 instructing her to return to work by May 30 at 9:30 a.m. She called Turkessa Hill on May 30, 2006 but did not return to work.

Claimant received employer's letter on June 1, which was mailed on May 30 and the first delivery attempt was on May 31. She did not present any other medical documentation to employer or IWD to explain or excuse any absences after March 20, 2006 except one medical excuse for May 24, 2006 when she "was seen" at Community Health Care. (Claimant's Exhibit A and Employer's Exhibit 1)

The claimant has received unemployment benefits since filing a claim with an effective date of June 25, 2006.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

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 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).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Claimant's failure to report to work, notify employer of her current medical status or provide employer with medical excuses or documentation of her absences from March 21 through June 2, 2006 (except May 24, 2006) constitutes excessive unexcused absenteeism and is disqualifying misconduct. 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 July 27, 2006, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 \$2,470.00.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/cs