

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

REBECCA A TRAINER
124 EARL ST APT 10
EVANS DALE IA 50707

ACCESS DIRECT TELEMARKETING INC.
C/o JOHNSON & ASSOCIATES INC
N/K/A TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 04A-UI-02252-RT
OC: 01/18/04 R: 03
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant, Rebecca A. Trainer, filed a timely appeal from an unemployment insurance decision dated February 20, 2004, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on March 18, 2004, with the claimant participating. Mary Mattocks, Program Manager, participated in the hearing for the employer, Access Direct Telemarketing, Inc. The employer was represented by Peg Heenan of Johnson & Associates, Inc., now known as TALX UC eXpress. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time telephone sales representative from May 21, 2003 until she was effectively discharged on January 26, 2004 for poor attendance. The claimant was absent from work on January 22, and 23, 2004 because of transportation problems in as much as her automobile broke down. Whether the claimant properly reported these absences is not clear. On what would be the next working day for the claimant, January 26, 2004, she called the employer and was informed or she learned that she had been discharged for attendance. The claimant anticipated that she would be discharged. The claimant was absent on January 20, 2004 because her son was in an accident and she properly reported this absence. The claimant worked on January 21, 2004 and during that day, the employer had decided to discuss the claimant's attendance with the claimant and perhaps discharge her, but the claimant was then absent the next two working days. The claimant was tardy on January 8, 13, 14, 2004, because of vehicle problems or transportation. The employer had never promised the claimant that it would provide transportation. On December 22, 2003, the claimant left work early because she had lost her voice. She had permission from the employer to do so. The claimant was absent on November 18, 2003 for personal illness and this was properly reported. The claimant was tardy on November 13, 2003 again because of car problems although this was properly reported. The claimant left work early on November 6, 2003 and was absent on November 4, 2003, both for personal illness and both were properly reported.

The claimant received a long series of warnings or disciplines for her attendance as follows: a verbal warning on September 9, 2003; a written warning on October 1, 2003; a verbal warning on November 4, 2003; a written warning on November 6, 2003; a written warning on November 13, 2003; a final written warning on November 18, 2003; and another final written warning on January 8, 2004. The claimant was aware that the employer was concerned about her attendance. In some situations, an employee is able to make up absent time by working other hours. The records indicate that the claimant has been overpaid unemployment insurance benefits in the amount of \$26.00 from 2000.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from the employment was a disqualifying event. It was.

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) 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).

(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.

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). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. Both parties concede that there was a discharge, but seemed to disagree as to exactly when the claimant was discharged. The administrative law judge concludes that the claimant was effectively discharged on January 26, 2004. The employer's witness, Mary Mattocks, Program Manager, testified that the claimant was discharged on January 21, 2004 but the claimant was not informed of her discharge that day and Ms. Mattocks testified that she had decided to meet with the claimant the next working day, January 22, 2004 and discuss her attendance with her and perhaps discharge the claimant. Nevertheless, the claimant was absent on that day and the next working day, January 23, 2004. The claimant testified that on the next working day thereafter January 26, 2004, she called and spoke to Ms. Mattocks and was told that she was discharged. Ms. Mattocks does not remember this phone call. Nevertheless, because of the situation here where the claimant really never returned to work after January 21, 2004 because of transportation problems and was officially not informed of her status until at least January 26, 2004, the administrative law judge concludes that the claimant was effectively discharged on January 26, 2004. The uncontraverted evidence establishes that prior to the claimant's effective discharge she was tardy on four occasions because of transportation; November 13,

2003; January 8, 13, 14, 2004. It does appear that the claimant properly reported all of these tardies. In addition to these tardies the claimant was also absent two days because of car problems; January 22, 23, 2004. It is uncertain whether she properly reported these two absences. Based only on these absences and tardies for transportation, and based on the warnings discussed below, the administrative law judge concludes that these absences and tardies were not for reasonable cause and were excessive unexcused absenteeism. The administrative law judge can understand an occasional but rare tardy or absence for transportation, but here the claimant had three tardies and two absences in just over two weeks for transportation. The administrative law judge concludes that this is excessive and unreasonable. It is the claimant's responsibility to see that she gets to work. The other absences and tardies as set out in the Findings of Fact relate to personal illness or to an automobile accident involving the claimant's son and were for reasonable cause or personal illness and properly reported. The claimant received numerous verbal and written warnings as set out in the Findings of Fact. The claimant denied or failed to recall some of these warnings but the administrative law judge concludes that the claimant's testimony here is not as credible as that of the employer's witness, Mary Mattocks, Program Manager, who straight forwardly testified as to the warnings set out in the Findings of Fact. It is clear from these warnings that the employer was most concerned about the claimant's absenteeism and the claimant even concedes that she was aware that the employer was concerned. Nevertheless, the claimant did not appear to make any real effort to come to work promptly and avoid the transportation problems. The claimant knew, at least by November 13, 2003, that her car needed repairs but did nothing to fix her car.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

DECISION:

The representative's decision dated February 20, 2004, reference 02, is affirmed. The claimant, Rebecca A. Trainer, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits. Records indicate that the claimant has been overpaid unemployment insurance benefits in the amount of \$26.00 for 2000.

kjf/b