

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

JUSTINE LAMBERT
1208 DES MOINES ST
KEOKUK IA 52632

ACCESS DIRECT TELEMARKETING INC
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-0007

Appeal Number: 05A-UI-02228-JTT
OC: 02/06/05 R: 04
Claimant: Appellant (2)

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)

871 IAC 24.22(j) – Reemployment at the End of a Negotiated Leave of Absence

STATEMENT OF THE CASE:

Justine Lambert filed a timely appeal from the March 3, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 21, 2005. Ms. Lambert participated in the hearing. Robyn Rimington of Johnson & Associates/TALX represented Access Direct. Ms. Rimington presented testimony through Natalie Humphrey, Administrator of Access Direct's Keokuk office, and Spring Bergheger, Program Manager. Exhibits Two, Three, and Four were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Justine Lambert was employed by Access Direct as a full-time Telephone Sales Representative (TSR)

from May 25, 2003 until January 4, 2005, when Program Manager Spring Bergheger advised Ms. Lambert that her employment had been terminated based on her failure to return from her leave of absence and for being a "no-call, no-show" for three consecutive shifts on December 29, December 30 and January 3.

Ms. Lambert commenced a leave of absence on November 1, 2004. The leave was based on a prolonged bout of laryngitis and hoarseness of voice. On November 3, Ms. Lambert saw her general physician and provided Access Direct with a doctor's excuse for November 3 through November 4. On November 5, Ms. Lambert again saw her general physician and provided Access Direct with a doctor's excuse for November 3 through November 16. On November 16, Ms. Lambert met with an otolaryngologist and provided Access Direct with a doctor's excuse for November 16 through November 23. On November 23, Ms. Lambert met with the otolaryngologist and provided Access Direct a doctor's excuse for November 23 through December 7. On December 7, Ms. Lambert again met with the otolaryngologist and provided Access Direct a doctor's excuse for December 7 through December 21. On December 21, Ms. Lambert provided Access Direct with a doctor's excuse for December 21 through December 28. By this point, Ms. Lambert had become financial unable to consult with the otolaryngologist, but was able to secure one last doctor's excuse without actually seeing the doctor.

Access Direct was aware of Ms. Lambert's health condition as of November 1. Ms. Lambert was unable to perform her telephone sales duties because she had little or no voice. Ms. Lambert maintained regular contact with the center manager, Ron Dick, and administrator, Natalie Humphrey. When it became apparent that Ms. Lambert would need to be away from work for an extended time, Ms. Humphrey provided Ms. Lambert with application materials for a leave of absence under the Family and Medical Leave Act (FMLA). Ms. Lambert had the otolaryngologist complete the paperwork and returned it to Ms. Humphrey in a timely fashion. Ms. Humphrey forwarded the application to Access Direct's corporate office, which denied the request for FMLA leave. In early December, Ms. Humphrey advised Ms. Lambert that her request for leave under the FMLA had been rejected. Ms. Humphrey and Mr. Dick made the decision to authorize a personal leave of absence for Ms. Lambert. Ordinarily, there was a 30-day limit on a personal leave of absence. However, Ms. Humphrey and Mr. Dick waived the 30-day limit as it pertained to Ms. Lambert's leave of absence. Ms. Lambert continued to maintain appropriate contact with Access Direct. Ms. Lambert sought and received reassurance from Mr. Dick and Ms. Humphrey that her position would be waiting for her when she regained her voice. Pursuant to the employer's leave policy, Ms. Lambert understood that she would be required to provide a medical release before she would be allowed to return to work.

In late November or early December, Ms. Lambert asked whether she could perform other duties for Access Direct until she regained her voice, but was advised this was not an option. Without an income, Ms. Lambert reached a point where she could no longer afford to see the otolaryngologist. Ms. Lambert shared this information with Mr. Dick and/or Ms. Humphrey in early December and was again assured that her position would be waiting for her when she recovered. With the approval of her leave of absence and reassurance from Access Direct that she would be able to return to work upon recovery, Ms. Lambert decreased the frequency of her contact with Ms. Humphrey and/or Mr. Dick to once a week. Ms. Lambert was unaware that her last doctor's excuse expired on December 28. Ms. Lambert contacted Ms. Humphrey during the last week of December, but the subject of an additional doctor's excuse was not discussed.

Access Direct put Ms. Lambert back on the schedule on December 29, though it had not been provided with a medical release indicating that Ms. Lambert could return to work. Access Direct did not alert Ms. Lambert that it had placed her back on the schedule or expected her to return to work on December 29 through January 3. Ms. Lambert was unaware that the employer had placed her back on the schedule and was continuing under the belief that she needed to check in at least once a week. On January 4, Ms. Lambert's program manager, Spring Bergheger, contacted her to inquire why she had not returned to work and to advise that Ms. Lambert's employment had been terminated after she was a "no-call, no-show" for three consecutive shifts. This was the first Ms. Lambert was aware that Access Direct considered her to no longer be on an approved leave of absence, had placed her on the schedule, and terminated her employment.

Ms. Lambert did not regain her voice until January 26. Ms. Lambert had not sought work prior to January 4, because she intended to return to work at Access Direct. With the loss of her position at Access Direct, Ms. Lambert made an unsuccessful attempt to solicit work hanging wallpaper. Ms. Lambert was fully able to return to work on or about January 26, 2005.

REASONING AND CONCLUSIONS OF LAW:

A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for that period. 871 IAC 24.22(j). The evidence in the record, set forth in the Findings of Fact, establishes that from November 1 until through at least December 28, Ms. Lambert was on an approved leave of absence and was, therefore, voluntarily unemployed. Accordingly, Ms. Lambert would not be eligible for benefits during that period. See 871 IAC 24.22(j). However, Ms. Lambert's claim for benefits was not effective until February 6, 2005, and Ms. Lambert did not receive any benefits for the period during which she was on leave.

If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(j)(1). On the other hand, if the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits. 871 IAC 24.22(j)(2).

The issue in this case is whether a reasonable person in Ms. Lambert's position would have believed that he or she was still on an approved leave of absence on January 4, when Access Direct terminated Ms. Lambert's employment based on three consecutive "no-call, no-shows." See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

Ms. Lambert never evidenced an intention to sever the employment relationship. Nor had Ms. Lambert committed an overt act to sever the employment relationship. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, (Iowa 1980) and Peck v. Employment Appeals Board, 492 N.W.2d 438 (Iowa App. 1992). On the contrary, Ms. Lambert continued to maintain regular contact with the employer up to and including the week prior to her discharge. Ms. Lambert kept the employer aware of her health and her financial circumstances, and continued to be reassured by Access Direct that her job would be there for her when she recovered her voice. Access Direct took no steps to alert Ms. Lambert that it considered her approved leave of absence to have expired. Based on the evidence in the record, as set forth in the Findings of Fact, the administrative law judge concludes that it was entirely reasonable for Ms. Lambert to

believe that she continued on an approved leave of absence. By terminating the employment relationship on January 4, Access Direct indicated its refusal to reemploy Ms. Lambert at the end of an approved leave of absence. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Access Direct failed to reemploy Ms. Lambert at the end of a period of negotiated leave of absence. Accordingly, Ms. Lambert is considered laid off and is eligible for benefits. See 871 IAC 24.22(j)(1).

Based on the evidence in the record and application of the appropriate law, the administrative law judge further concludes that Ms. Lambert was able and available for work effective January 26, 2005. See Iowa Code section 96.4(3).

DECISION:

The Agency representative's decision dated March 3, 2005, reference 01, is reversed. The employer failed to reemploy the claimant at the end of a period of negotiated leave of absence. The claimant is, therefore, considered laid off. The claimant is eligible for benefits, provided she is otherwise eligible. The claimant was able and available for work effective January 26, 2005.

jt/s