

**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**

**MADERIA A HANSEN
2223 O AVE NW
CEDAR RAPIDS IA 52405**

**ACCESS DIRECT TELEMARKETING INC
c/o JOHNSON & ASSOCIATES
NOW TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-05048-RT
OC: 04-04-04 R: 03
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Access Direct Telemarketing, Inc., filed a timely appeal from an unemployment insurance decision dated April 23, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Maderia A. Hansen. After due notice was issued, a telephone hearing was held on May 27, 2004 with the claimant participating. Jason Clausen and Keisha Guyer participated in the hearing for the employer. The employer was represented by Lynn Corbeil of Johnson & Associates, now TALX UC eXpress. Employer's Exhibits 1 through 3 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Becky Thomas

was available to testify for the employer but not called because her testimony would have been repetitive and was unnecessary.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 through 3, the administrative law judge finds: The claimant was employed by the employer as a full-time telephone sales representative (TSR) from July 8, 2001 until she was discharged on April 5, 2004. The claimant was discharged for her behavior on the call floor on April 5, 2004 and her attendance. Several weeks prior to her discharge, the claimant was off work for three weeks because of surgery. She had a leave of absence for these absences and provided the employer a doctor's note. The claimant was prescribed medication that made her drowsy. Further, the weekend before, the claimant had had personal problems and had to move and this caused her to be tired on April 5, 2004, which was a Monday. Combining the tiredness with the medication, the claimant fell asleep several times while at work. Each time she did so, her supervisor, Keisha Guyer, approached the claimant and told her that she had to stay awake. The claimant had never exhibited these difficulties previously. The claimant informed Ms. Guyer that she was under the medication and that it made her drowsy. The medication and the claimant's tiredness caused her to slur her speech and to occasionally quote incorrect information. The claimant appeared unfocused. The claimant had never received any warnings or disciplines for similar behavior but had received written warnings on March 4, 2004 and November 7, 2003 for not responding properly to telephone calls as shown at Employer's Exhibit 1. Ms. Guyer noticed some of these symptoms by monitoring a couple of the claimant's telephone calls as shown at Employer's Exhibit 2. The employer has a policy prohibiting misrepresentation of a service or a product as shown at Employer's Exhibit 3.

Concerning the claimant's attendance, she had had four occurrences, a mix of tardies and absences prior to her discharge but the employer had no dates for these. The claimant had also received some warnings for her attendance but again the employer had no dates for these. On April 3, 2004, the claimant had expressed concerns to the employer about her attendance and she was told not to worry about her attendance.

Pursuant to her claim for unemployment insurance benefits filed effective April 4, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,251.00 as follows: \$141.00 for benefit week ending April 10, 2004 (earnings \$90.00) and \$185.00 per week for six weeks from benefit week ending April 17, 2004 to benefit week ending May 22, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including excessive unexcused absenteeism. The

employer's witnesses testified that the claimant was discharged for two reasons; her behavior on the call floor on April 5, 2004 and her attendance.

Concerning the claimant's behavior on the call floor, the claimant fell asleep several times while sitting at her desk working. The claimant credibly testified that she had just returned from a three-week leave of absence for surgery and she was under some medication which made her drowsy. The employer was aware of the claimant's medication and that it made her drowsy. Further compounding the claimant's difficulty was that she had had to move over the weekend immediately prior to April 5, 2004 which was a Monday. The claimant was tired from this move. This caused the claimant to become drowsy and briefly fall asleep several times. The claimant's supervisor, Keisha Guyer, approached the claimant several times and told the claimant she must stay awake and the claimant attempted to do so but did drowse off occasionally. The combination of the tiredness and the medication also caused the claimant to occasionally slur her speech and to seem unfocused and to quote incorrect information. The claimant was then discharged. Ms. Guyer did concede that the claimant had never committed such behavior before. Because the claimant had not committed this behavior before and because of the unusual circumstances on the claimant on April 5, 2004, the administrative law judge concludes that claimant's behaviors were not deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor do they evince willful or wanton disregard of the employer's interests nor are they carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that claimant's behaviors were mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity or ordinary negligence in isolated instances, none of which is disqualifying misconduct. The claimant did receive two written warnings as shown at Employer's Exhibit 1 but these are different from the behaviors giving rise to the claimant's discharge. The administrative law judge concludes that their relevance at most is merely indirect and is not sufficient to establish disqualifying misconduct.

Concerning the claimant's attendance, the employer's witnesses testified that the claimant had four occurrences of a mix of absences and tardies but could provide no dates. Further, the employer's witnesses testified that the claimant had had some warnings about her attendance but again could provide no dates. All the parties agreed that the claimant had been on a leave of absence for three weeks for surgery and the claimant had provided a doctor's note and the employer was aware of her absences here. On the evidence here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant had sufficient tardies and absences that were not for reasonable cause and not properly reported. Therefore, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct. The claimant testified credibly that she was told on April 3, 2004 that she should not worry about her absences.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to

warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,251.00 since separating from the employer herein on or about April 5, 2004 and filing for such benefits effective April 4, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 23, 2004, reference 01, is affirmed. The claimant, Maderia A. Hansen, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/b