

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

LISA READER
114 W 9TH ST
COAL VALLEY IL 61240-9120

IOC SERVICES LLC
1641 POPPS FERRY RD B #1
BILOXI MS 39532-2226

Appeal Number: 06A-UI-02409-RT
OC: 01-29-06 R: 12
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, Lisa Reader, filed a timely appeal from an unemployment insurance decision dated February 17, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on March 16, 2006, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the Notice of Appeal. Sara Frank, Human Resources Managerial Associate, participated in the hearing for the employer, IOC Services LLC. Dawn Huse, Front Desk Supervisor, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Jason True sat in on the hearing for the employer. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The hearing began when the record was opened at 10:04 a.m. and ended when the record was closed at 10:20 a.m. and the claimant had not called by that time. The claimant called the administrative law judge at 11:35 a.m. on March 16, 2006. She informed the administrative law judge that she had received a copy of the notice for hearing and knew the hearing was at 10:00 a.m. and further saw the telephone numbers and the hours that telephone calls could be made but nevertheless attempted to call in a telephone number after hours and never attempted to call in a telephone number during the hours set out on the notice. The claimant stated that she called another number and left a voice mail message but the administrative law judge explained that the Appeals section has no such voice mail messages and that she must call during the hours as set out on the notice. The claimant had no control number. The claimant had no reasonable explanation as to why she waited until 11:35 a.m. to call when the hearing was scheduled at 10:00 a.m. and she was aware of the time for the hearing. The claimant conceded that she should have called sooner. The administrative law judge explained to the claimant that he could not now take evidence since the record had been closed but that he would treat her telephone call as a request to reopen the record and reschedule the hearing made after the record had been closed and the hearing completed. The administrative law judge concludes that the following rule is applicable here:

871 IAC 26.14(7) provides:

- (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
 - a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
 - b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
 - c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The administrative law judge concludes that the claimant's request to reopen the record and reschedule the hearing made after the record had been closed and the hearing held should be and hereby is denied. The claimant did not demonstrate good cause for reopening the record and rescheduling the hearing. The claimant stated that she received the notice and read the notice and even knew the hours that she was to call in but did not call during those hours. Failure to read the notice and follow the instructions on the notice is not good cause to reopen the record and reschedule the hearing. Further, the claimant did not call promptly at 10:00 a.m. even though she knew the hearing was at 10:00 a.m. and her failure to do so is also not good cause to reopen the record and reschedule the hearing. The claimant's request to reopen the record and reschedule the hearing is denied.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 front desk clerk from August 13, 2002 until she was discharged on January 29, 2006 for poor attendance. The claimant had numerous tardies that caused her discharge: January 28, 2006, tardy 14 minutes; December 28, 2005, tardy 12 minutes; December 8, 2005, tardy; October 23, 2005, tardy 9 minutes returning from lunch; June 27, 2005, tardy 6 minutes from returning from lunch; June 13, 2005, tardy 10 minutes returning from lunch; March 19, 2005, tardy. The claimant had no explanation for any of these tardies and did not notify the employer of any of the tardies despite an employer's policy that an employee who is going to be absent or tardy must give two hours' notice to the employer. This policy is in a handbook, a copy of which the claimant received and for which she signed an acknowledgment.

The claimant received numerous warnings for her attendance as shown at Employer's Exhibit One as follows: A written warning on March 19, 2005; a written warning on June 17, 2005; a written warning on June 27, 2005; a final written warning on October 23, 2005; a written warning on December 8, 2005; and finally a final written warning on December 28, 2005. Despite the warnings the claimant was late on January 28, 2006 14 minutes and sent home that day and then discharged by telephone the next day.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from 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 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 employer's witness, Sara Frank, Human Resources Managerial Associate, credibly testified, and the administrative law judge concludes, that the claimant was discharged on January 29, 2006. 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). 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 and in particular tardies. Ms. Frank credibly testified that the claimant had seven tardies in the last ten months of her employment. The claimant provided no reasons for any of the tardies and none were reported to the employer. Some of the tardies were simply a failure to return promptly from a lunch break. The claimant received six written warnings for her attendance as shown at Employer's Exhibit One. Because of the numerous written warnings and the claimant's persistence in being tardy, the administrative law judge concludes the claimant's tardies were not for reasonable cause or personal illness and were excessive unexcused absenteeism (and tardies). Accordingly, the administrative law judge concludes that the claimant was discharged for 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 of February 17, 2006, reference 01, is affirmed. The claimant, Lisa Reader, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism and tardies.

kkf/s