

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSH A PIERCE**  
Claimant

**APPEAL NO. 08A-UI-00034-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**APAC CUSTOMER SERVICES OF IOWA**  
Employer

**OC: 06/24/07 R: 04**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

APAC Customer Services of Iowa (employer) appealed a representative's December 20, 2007 decision (reference 07) that concluded Josh Pierce (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 16, 2008. The claimant participated personally. The employer participated by Turkessa Hill, Hearings Representative Generalist.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 28, 2006, as a full-time customer service representative. The claimant signed for receipt of the employer's handbook and attendance policy. The handbook indicates that an employee will be terminated for accumulating eight attendance points.

The claimant suffered a non-work-related neck injury and was absent from work from June 25 through August 20, 2007. Afterwards he returned to work as much as he was able for 30 days. The claimant took narcotics for the pain and could not work while taking the medication. Sometimes he left work early to take his medication. The employer asked the claimant for another doctor's note stating either the change in the claimant's medical instructions or the same instructions should continue. The claimant only provided notes indicating he had seen a physician. The employer began to count the claimant's absences to take medication as unexcused absences because he did not provide current documentation.

The claimant received warnings for accumulation of attendance points. He was absent twice because he did not have childcare for his ten, seven, six and three-year-old children. He was absent twice for car issues. He was absent three times for medical issues.

On November 29, 2007, the claimant was absent again because his car would not start. He notified the employer and arrived at work late. A lead worker told the claimant that he would probably be terminated for his absence. The claimant had a personality conflict with the lead worker. He was frustrated by not having the proper authentication to perform his work since he returned in August 2007. He wanted to hear he was fired from his superior. He told the lead worker he was going home even though she encouraged him to stay. The claimant returned to work on November 30 and December 3, 2007. His superior was not available so he returned home. On December 4, 2007, the superior was available and the claimant was discharged for excessive absenteeism.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Absenteeism arising out of matters of purely personal responsibilities such as

childcare and transportation are not excusable. Higgins v. Iowa Department of Job Service, 275 N.W.2d 187 (Iowa 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to follow instructions in the performance of the job. The claimant disregarded the employer's right by repeatedly failing to follow the employer's instructions. He failed to follow instructions by providing the proper documentation for his working conditions. He failed to follow instructions by being absent from work due to lack of childcare and transportation issues. He failed to follow instructions by working on his scheduled days, November 29, 30 and December 3, 2007. The claimant's disregard of the employer's interests is misconduct. As such the claimant is not eligible to receive unemployment insurance benefits.

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 claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

**DECISION:**

The representative's December 20, 2007 decision (reference 07) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,212.00.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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