

**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**

**SOULYNHA V LO  
375 NW AURORA AVE  
DES MOINES IA 50313-3563**

**WELLS FARGO BANK  
C/o TALX EMPLOYER SERVICES  
PO BOX 1160  
COLUMBUS OH 43216-1160**

**Appeal Number: 06A-UI-05223-LT  
OC: 04-23-06 R: 02  
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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Iowa Code § 96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Employer filed a timely appeal from the May 12, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 1 and the record was reopened on June 7, 2006. Claimant did not participate on June 1 but did on June 7. Employer participated through Rick Kephart. Employer's Exhibit 1 was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time customer service representative (CSR) through April 25, 2006, when he was discharged after calling in sick on April 25 to his supervisor, Rick Kephart. Kephart testified claimant did not mention illness and he specifically asked claimant if he was ill

to which claimant responded he was not, however, the April 26 e-mail regarding that incident does not mention a discussion about whether or not claimant was ill. (Employer's Exhibit 1, page 1) Kephart reminded him he was on a final written warning and if he did not report to work his employment would be terminated. Both parties were on cell phones and both thought the other disconnected the call.

Kephart would have terminated the employment regardless of the reason for the absence. Employer verbally warned claimant about attendance on January 26, 2006, and a final written warning on April 19, 2006 about attendance issues. (Employer's Exhibit 1) All other absences were related to claimant's personal illness or the birth and related medical issues of his son on January 12, 2006. Claimant did not see doctors for his own illnesses and employer did not request medical documentation.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Absences related to lack of childcare are generally held to be unexcused. *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Technology, Inc.*, 465 N.W.2d 721 (Minn. App. 1991). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for

unemployment insurance benefits related to that separation. In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Because the final absence for which he was discharged was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

**DECISION:**

The May 12, 2006, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

dml/kkf