

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MELANIE L POSTEL**  
Claimant

**APPEAL NO. 08A-UI-03438-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RMG DIRECT INC**  
Employer

**OC: 03/16/08 R: 04  
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

RMG Direct (employer) appealed a representative's April 4, 2008 decision (reference 02) that concluded Melanie Postel (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 April 22, 2008. The claimant participated personally. The employer participated by Dominic Colella, Vice President/General Manager.

**ISSUE:**

Should the previous decision be affirmed?

**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 27, 2007, as a full-time telemarketing sales representative. The claimant signed for receipt of the employer's handbook on August 27, 2007. The employer issued the claimant four warnings for attendance issues in 2007. Those warnings dropped off the claimant's record at the beginning of 2008.

The employer issued the claimant warnings for attendance on January 22, February 6, 19 and 25, 2008. In the first two months of 2008, the claimant was absent 24 times. She was tardy for work five times. She was absent due to illness five times and due her four-year-old son's illness five times. She did not appear for work due to lack of transportation six times. She was absent three days for personal business.

On March 4, 2008, the claimant left work early to care for her son who was ill. The employer terminated the claimant on March 10, 2008.

## REASONING AND CONCLUSIONS OF LAW:

The issue is whether 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(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 has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In light of good faith effort, absences due to inability to obtain childcare for a sick infant, although excessive, did not constitute misconduct. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991). 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).

The claimant's final absence was due to her lack of childcare, a personal issue. The childcare was for a sick four-year-old, not an infant. The claimant's absence due to lack of childcare for her sick four-year-old rises from a purely personal responsibility. The claimant's absence is not excusable. The employer has met its burden of proof to show misconduct. 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 unemployment insurance decision dated April 4, 2008, reference 02, 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 \$1,184.00.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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