

**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**

**ALLISON M WUERZBERGER
5808 HILLANDALE RD
DAVENPORT IA 52806**

**APAC CUSTOMER SERVICES
OF IOWA LLC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166**

**Appeal Number: 05O-UI-05605-JTT
OC: 02/27/05 R: 04
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

STATEMENT OF THE CASE:

APAC Customer Services filed a timely appeal from the March 25, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 14, 2005. Allison Wuerzberger (claimant) participated in the hearing. Turkessa Hill, Human Resources Coordinator, represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Allison Wuerzberger was employed by APAC as a part-time customer service representative from October 14, 2004 until March 1, 2005, when APAC terminated the employment based an alleged abandonment of the employment. Ms. Wuerzberger's set hours of employment were

2:00-7:00 p.m., Monday, Tuesday, Thursday and Friday, and 10:00a.m. to 6:30 p.m. on Sunday. Ms. Wuerzberger last worked a shift for APAC on Sunday, February 20.

On Monday, February 21, Ms. Wuerzberger provided APAC with a medical excuse that excused her from work on February 21 through March 1, with an anticipated return to work on March 2. Ms. Wuerzberger delivered the medical excuse to APAC approximately one half hour prior to the start of her shift. Ms. Wuerzberger's director supervisor, Team Lead Dana Shabe, was on her lunch break when Ms. Wuerzberger arrived with the medical excuse. Only one other Team Lead was available at the time. Ms. Wuerzberger provided her medical excuse to that Team Lead and asked that person to provide the document to Ms. Shabe. The person to whom Ms. Wuerzberger provided the medical excuse has a desk next to or near Ms. Shabe's desk. Prior to leaving APAC on February 21, Ms. Wuerzberger made an additional effort to locate Ms. Shabe at the place of employment, but was unsuccessful.

The employer did not acknowledge Ms. Wuerzberger's medical excuse. APAC staff overlooked, failed to document, and/or misplaced the medical excuse. On March 1, after Ms. Wuerzberger did not appear for her scheduled shifts on February 21, 22, 24, 25, and 27, or contact the employer on those days, APAC concluded she had voluntarily terminated the employment. APAC has a written policy that three days of "no-call, no-show" are deemed to be a voluntary termination of the employment. Ms. Wuerzberger acknowledged the policy in writing at time she was hired. APAC also has a written attendance policy that requires employees to contact the employer on each day they need to be absent. Ms. Wuerzberger also acknowledged this policy in writing at the time she was hired. However, under APAC's work rules, the requirement that an employee contact the employer each day of an absence does not apply where the employee has provided a doctor's excuse for multiple days prior to the period of absence.

When Ms. Wuerzberger arrived for work on March 2, 2005, her computer sign-in card did not work. Ms. Wuerzberger spoke to Ms. Shabe, who advised Ms. Wuerzberger that her employment had been terminated under APAC's three-day "no-call, no-show" policy. Ms. Wuerzberger advised Ms. Shabe that she had provided a doctor's excuse before the absence. Ms. Shabe indicated she had no knowledge of the medical excuse. Within a few days, Ms. Shabe contacted Ms. Wuerzberger and advised Ms. Wuerzberger that APAC had located the doctor's excuse. However, Ms. Shabe notified Ms. Wuerzberger that her termination would stand because Ms. Wuerzberger had not called in for each day of her absence. This was an erroneous statement of the employer's call-in policy.

REASONING AND CONCLUSION OF LAW:

The initial question for the administrative law judge is whether the evidence in the record establishes that Ms. Wuerzberger voluntarily quit the employment or was discharged.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). The evidence in the record establishes that Ms. Wuerzberger did not indicate an intention to quit the employment or commit an overt act that evidenced such an intention. On the contrary, prior to the missed shifts, Ms. Wuerzberger provided a doctor's excuse that excused her from those shifts. In addition, Ms. Wuerzberger appeared for her scheduled shift on March 2, pursuant to the doctor's excuse. The administrative law judge concludes that Ms. Wuerzberger was discharged and did not voluntarily quit the employment.

The next issue is whether the evidence in the record establishes that Ms. Wuerzberger was discharged for misconduct in connection with the employment. It does 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 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).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8). Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

The evidence in the record establishes that Ms. Wuerzberger took appropriate steps to provide APAC with a doctor's excuse that excused her from her shifts on February 21 through March 1. Under the employer's attendance policy and under the applicable law, Ms. Wuerzberger's absences were excused absences. See 871 IAC 24.32(7). See also Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wuerzberger was discharged for no disqualifying reason. Accordingly, Ms. Wuerzberger is eligible for benefits, provided she meets all other eligibility requirements.

DECISION:

The Agency representative's decision dated March 25, 2005, reference 01, is affirmed. The claimant was discharged from her employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/pjs