

**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**

**JANICE K SCHMIDTKE  
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MASON CITY IA 50401**

**SEATON CORPORATION  
STAFF MANAGEMENT  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-09530-DT  
OC: 07/25/04 R: 02  
Claimant: Appellant (2)**

**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, 4<sup>th</sup> 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)

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Janice K. Schmidtke (claimant) appealed a representative's August 26, 2004 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Seaton Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 28, 2004. The claimant participated in the hearing and presented testimony from one other witness, David Houdek. Brad Jones appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 30, 2002. The employer is a temporary employment firm that has an exclusive arrangement with a Mason City, Iowa business client; the employer provides employees long-term, open-ended work assignments at the business client. Employees' work schedule would be set each Friday for the following week. The claimant worked at the business client part time (approximately 24 to 30 hours per week) as a light industrial worker on a 6:00 p.m. to 12:00 a.m. schedule. Her last day of work was July 2, 2004. The employer discharged her on July 15, 2004. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy for employees at the business client was that discharge would occur if the employee accrued four attendance points in a 90-day period. During the period prior to July 15, the claimant had called in sick on May 18 and had been assessed a half-point. She had called in June 7 and had been assessed a half-point. On June 18 she had called at 5:50 p.m. to report she would be late due to not having a ride; she arrived at 6:23 p.m. and was assessed a half-point. On June 29 she called in sick and was assessed a half-point. On July 1 she was advised that she was at two points.

The business client did a holiday shut down the week of July 3. The claimant was uncertain as to when she would be scheduled back to work. On July 11 she attempted to access the building to check the schedule, but was unable to enter. On July 12, July 13, and July 14 she called the employer's office, twice each day, but was unable to reach anyone. She spoke to a coworker with whom she shared rides and he informed her he was scheduled to go back to work on July 15. Since the business client did not automatically start up immediately after just one week of holiday shut down, when the claimant heard from the coworker that he was not scheduled to return until July 15, she was not overly concerned by the fact that she had been unable to reach the employer's office to verify her schedule.

In actuality, the business client had begun a slow start up on July 12. The claimant was not scheduled on July 12 or July 13, but had been scheduled for July 14. Since the claimant did not know she was scheduled that date, she was a no-call/no-show. The employer assessed this as two points, bringing the claimant to four points. When she contacted the employer on July 15, she was informed she was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code Section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the

employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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, (7) provide:

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).

(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.

Misconduct connotes volition. Huntoon, supra. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had attempted in good faith to ascertain her schedule, and in good faith believed she was not scheduled to return to work until at least July 15, 2004; she did not have the requisite intent to violate the employer's policies or harm its interests. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 26, 2004 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/b