

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

LINDA D SPENCER
208 DICKMAN APT 260
DES MOINES IA 50315

ACCESS DIRECT TELEMARKETING INC
C/o JOHNSON & ASSOCIATES
NOW TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 05A-UI-11909-RT
OC: 10-23-05 R: 02
Claimant: Respondent (1-R)

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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Access Direct Telemarketing, Inc., filed a timely appeal from an unemployment insurance decision dated November 14, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Linda D. Spencer. After due notice was issued, a telephone hearing was held on December 8, 2005, with the claimant participating. Brian Mooney, Center Manager, and Gentry Cox, Administrative Assistant, participated in the hearing for the employer. The employer was represented by Lynn Corbeil of Johnson & Associates, now TALX UC eXpress. Employer's Exhibits One and Two and Department Exhibit One were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two and Department Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full time telephone sales representative (TSR) from October 18, 2004 until she was separated from her employment on October 24, 2005. The employer has a policy as shown at Employer's Exhibit One providing for a leave of absence for an employee up to a maximum 30 days if the employee provides proper documentation and the request is approved by the Center Manager and the Human Resources Manager. This policy is in the employer's handbook, a copy of which the claimant received and for which she signed two different acknowledgments on October 18, 2004 and February 22, 2005. The particular rule in question has not changed between those two dates.

In July of 2005 the claimant contracted viral meningitis and appropriately completed a request for a leave of absence under the employer's policies as shown at Employer's Exhibit Two. This request was approved. The claimant did not qualify for leave under the Family and Medical Leave Act. Apparently the claimant improved and returned to work. The claimant was then absent on October 5, 6, 7, 2005. The claimant had contracted Hepatitis C among other illnesses. She called the employer on October 10, 2005 and spoke to Brian Mooney, Center Manager and one of the employer's witnesses. The claimant informed Mr. Mooney that she would need to be absent for an extended period of time and needed to take a personal leave of absence. Mr. Mooney told the claimant that she should come to the office and submit the appropriate paperwork for a leave of absence and that it would be submitted to Human Resources. This was the same process the claimant had used previously for her leave of absence. However, the claimant did not come to the office. On October 7, 2005, the claimant consulted her physician. She called the employer while at the physician's office and spoke to Gentry Cox, Administrative Assistant. She explained to Ms. Cox that she was at the doctor's office and asked if she needed to fill out leave of absence papers. Ms. Cox told the claimant that she would have to fill out leave of absence papers and since she had been absent for three days she would need to do so by 3:00 p.m. At approximately 4:00 p.m. the claimant called Ms. Cox back and told Ms. Cox that she had just left her doctor's office and that she was on the way to the employer. The claimant did go to the employer but someone else was driving the claimant. The claimant was under chemotherapy and morphine patches due to her Hepatitis C and was unable to walk. The claimant's fiancé, Paul Bright took a doctor's slip into the employer. The doctor's slip appears at Department Exhibit One. The doctor's slip appears to excuse the claimant from work until October 24, 2005. The doctor's slip appears to have been altered in some way, since the date at the top of the slip reads "11" for the section for the month but the second "1" in the area of the date appears to be written over a "2". This note was delivered to Ms. Cox by Mr. Bright on October 7, 2005 but says that the claimant was seen on October 18, 2005. Ms. Cox told Mr. Bright that the claimant would need to complete leave of absence papers. However, the claimant was not able to do so at that time and went home.

The claimant was then off work until October 24, 2005 when she called and spoke to her supervisor, Matt Kaluza. The claimant asked if the leave of absence paperwork had been approved and Mr. Kaluza told the claimant that the employer had considered the claimant to have voluntarily quit since she had not turned in her leave of absence papers as instructed on October 7, 2005 and previously. The claimant had previous absences due to medical conditions, among the absences are included the leave of absence in July for viral meningitis. The claimant received a written verbal counseling for her attendance on May 24, 2005 and a second written verbal counseling for attendance on July 11, 2005. The employer had no

specific dates or times for any of the claimant's absences prior to October 5, 2005. The claimant had been a good employee for the employer including the recipient of certain recognitions and awards. Pursuant to her claim for unemployment insurance benefits filed effective October 23, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,680.00 as follows: \$240.00 per week for seven weeks from benefit week ending October 29, 2005 to benefit week ending December 10, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is 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).

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 first issue to be resolved is the character of the separation. The employer's witnesses maintain that the claimant voluntarily quit when she was absent on October 5, 6, and 7, 2005 without filling out appropriate leave of absence paperwork. The claimant maintains that she was discharged when she called her supervisor on October 24, 2005 after she had been released to work and was told that she was no longer an employee and had been terminated because she was considered to have voluntarily quit when she did not turn in her leave of absence paperwork. It is true that the claimant was absent on October 5, 6, and 7, 2005 and even thereafter through October 24, 2005. However, on October 5, 2005, the claimant reported her absence to the employer and informed the employer that she needed an extended period of time off. The claimant again spoke to the employer on October 7, 2005. Although the doctor's statement at Department Exhibit One appears to have been altered there is no other evidence to the contrary and therefore the administrative law judge must conclude that the doctor's statement at least excuses the claimant from work until October 24, 2005. There is also no evidence that the claimant was not seriously ill beginning on October 5, 2005 with Hepatitis C and under chemotherapy and a morphine patch. Therefore, the administrative law judge is constrained to conclude that the claimant was absent throughout this period of time for personal illness and that her absences were properly reported to the employer. The employer was aware that the claimant was ill and unable to come to work even though the employer may not have been aware specifically of the claimant's particular medical condition and the medications and drugs that she was administered. The claimant does not appear to have been absent for three days or more without notifying the employer. The claimant's telephone calls belie a voluntarily quit. Accordingly, the administrative law judge concludes that the claimant did not voluntarily leave her employment but rather was discharged on October 24, 2005 when she was told that she was terminated by her supervisor. The issue then becomes whether the claimant was discharged for disqualifying misconduct.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including, excessive unexcused absenteeism. The employer's witnesses testified that the claimant was absent on October 5, 6, and 7, 2005 and thereafter without completing a request for a leave of absence under the employer's internal policies as shown at Employer's Exhibit One. The claimant was informed on October 5, 2005, and again on October 7, 2005, that she needed to complete the paperwork for the leave of absence. The claimant did not do so. Although the claimant's testimony was not particularly credible, because her testimony was equivocal and the claimant often failed directly to answer the questions put to her and the claimant changed her testimony occasionally, the administrative law judge nevertheless is constrained to conclude that the

claimant was extremely ill on and after October 5, 2005 with Hepatitis C and under chemotherapy and morphine patches which made it extremely difficult, if not impossible, for the claimant to fill out the leave of absence paperwork.

The employer was aware no later than October 5, 2005, that the claimant had some kind of serious medical condition when the claimant called and spoke to the employer's witness, Brian Mooney, Center Manager, and informed him that she had a medical condition requiring an extended period of absence and requested a leave of absence for that medical condition. The claimant also spoke on October 7, 2005 to the employer's other witness, Gentry Cox, Administrative Assistant, and told her basically the same thing in two different conversations. In addition, the claimant's fiancé, Paul Bright, delivered a doctor's statement, as shown at Department Exhibit One, to the employer on October 7, 2005. It was on that day that the claimant had seen a physician and was unable to walk because of the medical condition and the drugs that she was taking and could not fill out the paperwork on that day. On the record here, the administrative law judge is constrained to conclude that the claimant's failure to fill out the paperwork was not a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor does it evince a willful or wanton disregard of the employer's interest nor is it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. It is true that the claimant had previously properly completed a request for a leave of absence on or about July 21, 2005 for viral meningitis as shown at Employer's Exhibit Two. However, this does not establish that the claimant was able but refused to fill out paperwork for the leave of absence that she requested on October 5, 2005. The administrative law judge is constrained to conclude that the claimant was unable to fill out such paperwork at that time and therefore her failure to do so was not disqualifying misconduct.

Concerning excessive unexcused absenteeism, the evidence establishes that the claimant was absent a significant period of time. However, the evidence also establishes that these absences were due to personal illness and were properly reported as discussed above. There was no evidence that the claimant was not seriously ill with Hepatitis C beginning October 5, 2005. The claimant also notified the employer, if not everyday, at least initially that she was going to be ill and absent for an extended period of time. There is evidence that the claimant had also been absent previously under a leave of absence for viral meningitis. These absences were for personal illness and were properly reported and were approved by the employer. There is no specific evidence of prior absences. The employer's witnesses did not have the details about any prior absences although there were references made. The administrative law judge must conclude that the reference to these prior absences is too vague and also too remote in time to be relevant here. It is true that the claimant got two warnings for her attendance, one on May 24, 2005 and another on July 11, 2005 but the warnings do not establish excessive unexcused absenteeism in the absence of specific evidence of absences that were not for reasonable cause or personal illness and not properly reported. Accordingly, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that

there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant a disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, she was not available or earnestly and actively seeking work and in particular not able to work. There was some evidence at the hearing that the claimant still has Hepatitis C and it is a serious debilitating illness. The issue as to whether the claimant is ineligible to receive unemployment insurance benefits because she was not able, available, or earnestly and actively seeking work, was not set out on the Notice of Appeal and therefore the administrative law judge does not have jurisdiction now to address that issue. Accordingly, that issue must be remanded to Claims for an investigation and determination.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,680.00 since separating from the employer herein on or about October 24, 2005 and filing for such benefits effective October 23, 2005. The administrative law judge further concludes that in so far as the claimant's separation from the employer herein is involved, the claimant is entitled to such benefits and is not overpaid such benefits.

DECISION:

The representative's decision of November 14, 2005, reference 01, is affirmed. The claimant, Linda B. Spencer, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein. This matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not available for work and earnestly and actively seeking work and in particular, not able to work.

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not available for work and earnestly and actively work and, in particular, not able to work under Iowa Code section 96.4-3.

kkf/kjw