

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

KATHLEEN L POLDBERG
1828 CENTRAL DR SW
CEDAR RAPIDS IA 52404

NCS PEARSON INC
c/o FRICK CO
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-02891-H
OC: 02-08-04 R: 03
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, 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

STATEMENT OF THE CASE:

Kathleen Poldberg filed an appeal from a decision dated March 8, 2004, reference 04. The decision disqualified her from receiving unemployment benefits. After due notice was issued, a hearing was held in Cedar Rapids, Iowa, on May 18, 2004. The claimant participated on her own behalf. NCS Pearson was paged in the main waiting area at 1:32 p.m. and again at 1:45 p.m. No one responded and the employer did not participate.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Kathleen Poldberg was employed by NCS Pearson from May 2003 until October 3, 2003. She was a full-time customer service representative working 8:00 a.m. until 5:00 p.m. During the course of her employment she received at least one written warning regarding her absenteeism.

Ms. Poldberg was absent for the entire week of Monday, September 29 through Friday, October 3, 2003. This was due to muscle spasms due to unknown causes. The claimant had attempted to contact her supervisor everyday but had only been able to reach a voice mail and leave a message. On Thursday, October 2, 2003, she called human resources in an attempt to talk to a person rather than leave a message, and was only able to leave another message. On Friday, October 3, Paula, the head of human resources, called her and asked if she could guarantee a return to work no later than Monday, October 6, 2003. Ms. Poldberg said she could not guarantee that and then the employer asked her where she wanted her personal belongings sent.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 record establishes the claimant did not quit but was asked to guarantee a return to work by a certain date which she could not do. Her absences were due to illness and were properly reported and cannot be considered misconduct under the provisions of Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982). It is essentially a discharge when the employer asked her where she wanted her personal belongings sent indicating she no longer had a position with NCS Pearson. There is no misconduct and disqualification may not be imposed.

DECISION:

The representative's decision of March 8, 2004, reference 04, is reversed. Kathleen Poldberg is qualified for benefits provided she is otherwise eligible.

tjc/kjf