

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANNETTE S LEWIS

Claimant

APPEAL NO: 14A-UI-06987-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHRISTIAN RETIREMENT HOMES INC

Employer

OC: 06/08/14

Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 24.10 – Employer Participation

STATEMENT OF THE CASE:

Christian Retirement Homes, Inc. (employer) appealed a representative's July 2, 2014 decision (reference 01) that concluded Annette S. Lewis (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 30, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Gina Schwartzhoff appeared on the employer's behalf and presented testimony from one other witness, Nancy Garrow. During the hearing, Employer's Exhibits One through Four were entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

FINDINGS OF FACT:

The claimant started working for the employer on December 2, 2013. She worked full time as a certified nursing aide (CNA). Her last day of work was May 28, 2014. The employer discharged her on that date. The reason asserted for the discharge was her attendance through both unexcused absences and tardiness.

The employer's attendance policy provides for discharge for either reaching 12 tardies or seven absences. The claimant had been given a final written warning for tardiness on May 8, having reached nine tardies through April 21, and also had been given a final written warning for absences on May 21, having reached six absences through May 17. The reasons for the six absences were not documented. The claimant then had a tenth, eleventh, and twelfth tardy on

May 8, May 13, and May 18. She also had a seventh absence on May 24, 2014. The specifics of all of the tardies were not documented, but the final tardy was that the claimant clocked in seven minutes late, one minute after the six-minute grace period. The final absence was when the claimant picked up an extra shift to work a first shift in addition to the second shift that she was routinely scheduled to work since she had called off work the prior weekend; she worked the first shift, but then left and refused to work the second shift. The claimant was subject to discharge for both the tardiness and the absences.

The claimant established a claim for unemployment insurance benefits effective June 8, 2014. A fact-finding interview was held with a Claims representative on July 1, 2014. The employer, through both Schwartzhoff and Garrow, participated directly in the fact-finding interview. The claimant has received unemployment insurance benefits after the separation in the amount of \$532.00.

REASONING AND CONCLUSIONS OF LAW:

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 § 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 § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. Rule 871 IAC 24.32(7). While the final absence might have been unexcused, it cannot be determined from the information provided by the employer whether the prior six absences were for reasons that would be considered to be unexcused so that the employer could establish that the claimant had excessive unexcused absenteeism. However, tardies can also be grounds for finding misconduct. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The presumption is that tardiness is generally within an employee's control and is unexcused. *Higgins*, supra. The claimant's final tardy was not excused and she had prior excessive unexcused tardies. The claimant had previously been warned that future tardies could result in termination. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a,-b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's July 2, 2014 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 28, 2014. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account is not subject to charge. The claimant is overpaid \$532.00, which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs