

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELE L SULLIVAN**  
Claimant

**APPEAL NO. 12A-UI-08900-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMMUNITY CARE INC**  
Employer

**OC: 04/22/12**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from a representative's decision dated July 18, 2012, reference 04, which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on August 29, 2012. Although notified, the claimant did not participate. The employer participated by Ms. Patti Perkins, RN/manager home health care, and Mr. Sid Bolton. Employer's Exhibits 1 and 2 were received into evidence.

**ISSUE:**

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Michele L. Sullivan was employed by Community Care, Inc. as a home health care aide from May 7, 2012, until June 22, 2012, when she was discharged for excessive absences and failure to notify the employer as required. Ms. Sullivan was employed on a part-time basis and was paid by the hour. Her immediate supervisor was Ms. Perkins.

Ms. Sullivan received a verbal warning on May 17, 2012, for failure to report or to provide required advance notification to the employer of her impending absence. The claimant received an additional written warning on June 4, 2012, for once again failing to report or provide required notification. The claimant was put on notice that future violations could result in her termination from employment. Ms. Sullivan was discharged when she failed to report for scheduled work on June 21, and June 22, 2012, and did not respond to messages left by the employer. Ms. Sullivan was aware that she was to work those days. At the time of discharge, the claimant provided no explanation for her failure to report or to provide required notification to the employer.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

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 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. 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 App. 1992).

No aspect of the contract of employment is more basic than the right of the employer to expect employees to appear for work on the hour and day agreed upon. Recurrent failure to report for

work or, in the alternative, provide required advance notification to the employer shows a disregard for the employer's interests and standards of behavior and thus may justify a finding of misconduct in connection with the work.

Inasmuch as the evidence in the record establishes the claimant had been specifically warned for failure to report or provide notification on two previous occasions and that the claimant once again did not report or provide notification on June 21, and June 22, 2012, the administrative law judge concludes the employer has met its burden of proof in showing disqualifying misconduct.

The claimant was not discharged during a trial period of employment based upon her difficulty in learning her assignment or her abilities, but because the claimant did not follow basic rules in providing notice to the employer for impending absences. The employer's expectations with regard to providing notice for absences were the same for permanent employees as it was for probationary employees. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

**DECISION:**

The representative's decision dated July 18, 2012, reference 04, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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