

**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**

**ROBIN DENNIS  
2619 INDIGO CT  
IOWA CITY IA 52246**

**CARE INITIATIVES  
c/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-02978-ET  
OC 02-15-04 R 03  
Claimant: Respondent (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/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 10, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 6, 2004. The claimant participated in the hearing. Gwen Dettbarn, Nursing Director, and Roxanne Bekaert, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One, Two and Three were admitted into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time CNA for Care Initiatives from December 3, 2002 to February 6, 2004. She was a no-call/no-show January 15, 2004, and received a written warning January 20, 2004, stating she needed to improve her attendance and call the employer if she was not going to be at work (Employer's Exhibit Two). On February 4, 2004, the claimant called the employer and reported her daughter was ill and she would not be in. She did not call or show up for work February 5 or 6, 2004. The employer called the claimant both days and left messages asking her to return its calls but the claimant did not call until February 6, 2004, at which time she told the employer she was calling as a "courtesy." She asked the employer if her employment was terminated and the employer stated she was discharged effective February 6, 2004 (Employer's Exhibit Three). The employer told the claimant if she had called in they might have been able to make arrangements for her absences and the claimant said she had been "too stressed out" to call. The employer's policy, which the claimant received and signed for, states that three no-call/no-shows would result in termination (Employer's Exhibit One). The claimant testified she called the employer February 4, 2004, and said she would not be in February 5, 2004, because she had court and further testified she traded shifts with another employee February 6, 2004, but the employer left a message stating she was discharged before the start of the shift she traded for. The claimant could not recall the name of the employee she spoke to when she called in February 4, 2004. The employer asked employees if anyone had taken a call from the claimant but none had, and an absence form was not completed, as is the employer's usual course of business when an employee calls to report an absence. The claimant did not tell the employer she traded shifts with another employee February 6, 2004, and all the other employees worked their shifts as posted on the schedule.

The claimant has claimed and received unemployment insurance benefits since her separation from Care Initiatives.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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) 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).

(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). While the claimant maintains she called the employer February 4, 2004, to report she would not be in February 5, 2004, and switched shifts with another employee February 6, 2004, the administrative law judge found the employer's testimony more credible. The claimant testified she previously told the employer she would be absent February 5, 2004, because she had to go to court but the employer had no record of her requesting that time off or calling February 4, 2004, and the claimant could not remember who she spoke to. Additionally, although the claimant testified she switched shifts with another employee February 6, 2004, and therefore was not scheduled to work until the second shift, no one else showed up to work the claimant's shift or failed to work their own shift, no one asked permission to change shifts, and the schedule was not changed to indicate the claimant traded shifts with another employee. Furthermore, the claimant did not tell the employer she called February 4 or that she had trades shifts with another employee when she called the employer February 9, 2004. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The March 10, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,820.00.

je/b