

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

SHANETT DAWKINS
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THE UNIVERSITY OF IOWA
c/o DAVE BERGEON EMPL RELATIONS
121 "R" UNIV SVC BLDG
IOWA CITY IA 52242

Appeal Number: 05A-UI-06017-ET
OC: 05-15-05 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, 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/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 June 2, 2005, 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 June 27, 2005. The claimant participated in the hearing. Dave Bergeon, Human Resources Specialist and Ray Haas, Human Resources Representative, participated in the hearing on behalf of the employer. Employer's Exhibit's One through Four 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 three-quarters time nursing assistant for The University of Iowa from November 03, 2003 to March 16, 2005. She was discharged for violation of the employer's attendance policy. On May 26, 2004, the claimant received a written reprimand for failure to show up for her scheduled shift May 22, 2004 (Employer's Exhibit One). That warning summarized the previous disciplinary actions taken in the past five months which included leaving early and excessive personal telephone usage January 9, 2004; excessive tardiness, leaving early, late sign-offs, and leaving bloody equipment in the Dirty Utility room January 13, 2004, and a verbal warning for three no-call no-shows for one scheduled shift and two additional shifts and for late sign-offs April 14, 2004 (Employer's Exhibit One). The warning stated the employer expected the claimant's attendance to improve and if it did not do so further progressive disciplinary action would be taken. It also indicated the claimant's performance would be reviewed on an ongoing basis until she demonstrated consistent improvement (Employer's Exhibit One). The claimant signed the warning (Employer's Exhibit One). On October 15, 2004, the claimant received another written warning and one-day suspension without pay because she was a no-call no-show October 4, 2004; was one hour late October 7, 2004, and was one hour late October 8, 2004 (Employer's Exhibit Two). The warning stated that if she did not sustain immediate improvement in attendance and punctuality, further progressive disciplinary action, including termination, could occur (Employer's Exhibit Two). On December 10, 2004, the claimant received another written warning and three-day suspension for failure to follow the employer's attendance policies (Employer's Exhibit Three). The warning discussed the fact that the employer recently agreed to change the claimant's work schedule to allow her to meet her transportation needs. The warning further stated that as a result of that accommodation the employer would have a zero-tolerance tardiness policy (Employer's Exhibit Three). The claimant violated the policy November 22, 2004, when she was one hour and 15 minutes late and December 10, 2004, when she was 12 minutes late (Employer's Exhibit Three). The claimant also cancelled a shift scheduled to begin December 11, 2004, thus violating the employer's 72-hour notice rule. The warning stated that a failure to improve her attendance and punctuality and to report for all shifts she was scheduled would result in further disciplinary action including termination of employment (Employer's Exhibit Three). On March 12, 2005, the claimant was scheduled to work at 7:00 a.m. and arrived at 7:45 a.m. The claimant had difficulty getting to work on time on Saturdays because the bus does not begin running until 7:00 a.m. but the employer posts the schedule six weeks in advance and the claimant failed to make other arrangements to get to work on time. On March 14, 2005, the claimant was a no-call no-show. She was not scheduled to work March 15, 2005, and the employer terminated her employment March 16, 2005, for failure to comply with the employer's attendance policy (Employer's Exhibit Four).

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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 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 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). The claimant received at least three written warnings and three suspensions due to her attendance and the employer has established that the claimant was warned that further unexcused absences could result in termination of employment. While the claimant argues that she could not get to work

on time on Saturday, March 12, 2005, because the bus did not start to run until 7:00 a.m., the employer posted the schedule six weeks in advance and consequently the claimant had plenty of time to make other arrangements to get to work on time, especially when she knew, or should have known, that her job was in jeopardy. Additionally, although the claimant testified she worked March 14, 2005, and was not a no-call no-show, her testimony was not as credible as that of the employer and the employer's explanation that the claimant was paid her remaining 3.5 hours of vacation time that day rather than her pay for a regular shift. The final absences, in combination with the claimant's history of absenteeism, are considered excessive. Benefits are withheld.

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 June 2, 2005, 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 \$908.00.

je/pjs