

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHRISTI A BENSON**  
Claimant

**APPEAL NO. 13A-UI-01073-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMPREHENSIVE SYSTEMS INC**  
Employer

**OC: 12/30/12**  
**Claimant: Respondent (2-R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the January 25, 2013 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on February 28, 2013. Claimant participated. Employer participated through human resources director, Sheryl Heyenga; program director, QUIDP Sondra Schmitt; vocational manager, Kerri White and overnight supervisor, Angel Johnson. Employer's Exhibit 1 was received.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Was the claimant overpaid benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a vocational trainer from October 24, 2011 and was separated from employment on December 27, 2012. She was a no-call/no-show for her 9:00 a.m. shift on December 20. (Employer's Exhibit 1, p. 14 - 19) Schmitt was the on-call supervisor that week and knew there was a snow storm coming so made sure she had coverage at all houses. On December 19 Schmitt left a voice message for claimant and texted to let her know she should report directly to Rownd house on December 20. On December 20 when claimant had not reported for work by 9:11 a.m., Schmitt called her in and texted her telling her she was waiting for her at Rownd. The employer's attendance policy requires a two hour notice. (Employer's Exhibit 1, pp. 8 - 10) At 11:00 a.m. claimant called Schmitt and told her she was sick and the doctor was busy. She gave no reason for not calling before going to the doctor or while waiting in the doctor's office. Schmitt asked her to provide a doctor's excuse. Claimant did not provide White or anyone else with a doctor's excuse or other evidence she had been seen by a medical professional on December 20.

She had a verbal warning on May 7, 2012 for tardiness on April 24, 25, 26, 27, May 2, 3, 4, 2012. (Employer's Exhibit 1, p. 7) A written warning was issued on August 20, 2012 for

tardiness on July 20, August 1, 2, 6, 7, 8, 10, 2012. (Employer's Exhibit 1, p. 6) She was suspended on December 19 after tardiness on September 11, 12, 13, October 10, 11, 15, 23, 25, 26, 29, November 1, 23, 29, December 3, 5, 10, 17, 2012. (Employer's Exhibit 1, p. 5)

Claimant believed she called the wrong number but the on-call phone has an incoming voice mail message identifying it as such and she Schmitt's number as an incoming call from the night before. Claimant did not call either the on-call phone or Schmitt's number to report her absence for December 20. Claimant argues the time clock is off by six minutes but she had multiple incidents of tardiness by more than six minutes because she babysits a friend's child and was delayed reporting for work to drop the child off at school in the morning.

Claimant received unemployment benefits after the separation on a claim with an effective date of December 30, 2012.

### **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(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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Claimant argues that she did call in, but may have called a wrong number, and did see a doctor, but did not present her cell phone records or a doctor's

note to the administrative law judge (ALJ) to rebut the employer's evidence. Thus, the employer's testimony and evidence is credible. An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. 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 because it was not properly reported. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The administrative law judge further concludes the claimant has been overpaid benefits.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

**DECISION:**

The January 25, 2013 (reference 01) decision is reversed. Claimant was discharged from employment due to excessive, unexcused absenteeism. 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.

**REMAND:** The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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