**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**KELLI D COOPER**
Claimant

**NEWTON VILLAGE INC**
Employer

**APPEAL NO. 12A-UI-06524-ST**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 05/06/12**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness

**STATEMENT OF THE CASE:**

The claimant appealed a department representative's decision dated May 24, 2012, reference 01, that held she was discharged for repeated tardiness on May 3, 2012, and benefits are denied. A hearing was held on June 27, 2012. The claimant participated. Margie Criswell, Marketing Director and Wally Uben, RN/Director, participated for the employer.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a full-time care attendant from January 3, 2011 to May 4, 2012. The employer does not have a written attendance and/or disciplinary policy that it provided to claimant. The employer did instruct claimant during orientation that she needed to call in and report any attendance issue before work.

The claimant was scheduled to work from 6:00 a.m. to 2:00 p.m. on May 3. Her car was taken the night before by a neighbor that is a special needs child in the apartment complex without her permission. When law enforcement stopped the car, the child did not have a license and claimant's car was impounded. Claimant did not press any charges against the child due to the circumstance.

Claimant took some Tylenol that caused her to oversleep and miss the start of her work shift on May 3. When she called at 10 a.m., RN Director Uben told her she had been replaced. When she came in on May 4, the employer terminated her due to being a voluntary quit as a no-call no-show to work on May 3 in light of other attendance issues.

Claimant had been given a verbal warning on February 24 about being late to work. The employer has a record of claimant being late on three additional occasions as well as being due to illness on two occasions.

**REASONING AND CONCLUSIONS OF LAW:**

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 administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on May 4, 2012, for excessive “unexcused” absenteeism/tardiness.

The employer could not explain why it considered claimant a voluntary quit based on a May 3 no-call no-show when it has no written policy as a basis for this action. Claimant made a late call to report her failure to report at 6:00 a.m., but this is not a no-call situation. She had a credible explanation why she had overslept though this is not considered as an excuse for missing work. The employer failure to have a formal attendance policy with corresponding progressive discipline makes it difficult to know whether there is uniformity when considering other employment separations.

Claimant did not voluntarily quit and there is no employer policy that applies to her termination. It is a stretch to consider her past attendance issues that influenced the employer to let claimant go as misconduct when it includes two absences due to properly reported illness. It is reasonable to sift through the employer recorded attendance issues in order to search for ones that might be misconduct when the employer did not do so when it terminated claimant.

**DECISION:**

The decision of the representative dated May 24, 2012, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on May 4, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs