

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANN M SHERMAN
Claimant

CRESTVIEW ACRES INC
Employer

APPEAL NO. 13A-UI-06908-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/19/13
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated June 5, 2013, reference 01, that held the claimant was not discharged for misconduct on April 2, 2013, and benefits are allowed. A hearing was held on July 19, 2013. The claimant did not participate. Harold McElderry, Administrator, participated for the employer. Employer Exhibit One was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds that: The claimant began employment on December 19, 2012 and last worked as a part-time dietary aide on March 30, 2013. The claimant received the employer attendance policy that provides for progressive discipline.

The claimant had an unexcused absence on January 1, 2013. She received a written warning for being late to work on January 8/9. She was given a written warning with a three-day suspension on March 16 for a failure to report to an agreed work shift replacement. She returned to work on March 22.

Claimant passed out at work on March 30 and was hospitalized. The employer assumed it was related to a pregnancy. Claimant was absent from work on March 31 and she was a no-call/no-show to work on April 1. When the employer talked with her on April 2, she had no doctor excuse or other explanation for her work recent absences. Although she had failed a drug screen on March 30 for a positive reasonable suspicion marijuana test, she was discharged for excessive unexcused absences.

Claimant failed to respond to the hearing notice. She has received benefits on her claim.

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 employer established misconduct in the discharge of the claimant on April 2, 2013, for excessive "unexcused" absenteeism.

The employer put claimant on notice she had an attendance problem with progressive discipline to the point of suspension in March 2013. She failed to excuse her absences on March 31 and April 1 that constitute job disqualifying misconduct in light of the discipline.

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.

Since claimant has been disqualified by this decision after receiving benefits on her claim, the overpayment issue is remanded to claims for a decision.

DECISION:

The decision of the representative dated June 5, 2013, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on April 2, 2013.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs