

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARRIE L SWAIN
Claimant

APPEAL NO. 07A-UI-10682-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PHIL WATSON PC
Employer

**OC: 10/21/07 R: 02
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Phil Watson PC, filed an appeal from a decision dated November 13, 2007, reference 01. The decision allowed benefits to the claimant, Carrie Swain. After due notice was issued, a hearing was held by telephone conference call on December 4, 2007. The claimant participated on her own behalf. The employer participated by Receptionist Amber Freeze, Office Manager Judy Watson, and Attorney Keisha Morris.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Carrie Swain was employed by Phil Watson PC from May 14 until October 24, 2007, as a full-time legal assistant. Her attendance was poor and her work performance had declined when Office Manager Judy Watson and Attorney Keisha Morris met with her about these problems. She was absent often due to illness but was frequently tardy and could not explain the reason for being late anywhere from ten minutes up to more than three hours.

She had been given a performance improvement plan earlier requiring her to do at least one petition per day to catch up on the backlog and she had still not met this goal. The employer notified her that further disciplinary action would be taken if improvement was not seen. The week ending October 19, 2007, she had produced only one petition the entire week.

Ms. Swain called in sick on October 22, 2007, but was no-call/no-show the next day. Her doctor's office had faxed in a statement to the employer indicating the claimant could return to work on October 23, 2007. When Ms. Watson spoke with her on October 24, 2007, the claimant maintained her doctor's office had made a mistake and she should have been excused until October 24, 2007, but she did not supply any corrected statement to the employer. She was discharged by Ms. Watson at that time.

Carrie Swain has received unemployment benefits since filing a claim with an effective date of October 21, 2007.

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(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.

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 claimant had been advised her job was in jeopardy as a result of her poor work performance and excessive absenteeism. The final event was a no-call/no-show to work on October 23, 2007. Her assertion the doctor's office made an error on the return to work date has not been supported by any evidence from the doctor's office. It must therefore be considered a final incident of unexcused absenteeism that, combined with the prior incidents of tardiness, is excessive. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of November 13, 2007, reference 01, is reversed. Carrie Swain is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. She is overpaid in the amount of \$1,492.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw