

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PEG FELLINGHAM**  
Claimant

**APPEAL NO: 07A-UI-00480-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ORSCHELN FARM & HOME LLC**  
Employer

**OC: 12-10-06 R: 02  
Claimant: Respondent (2)**

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 January 5, 2007, 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 January 30, 2007. The claimant participated in the hearing. Stacy Ellis, Associate Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time sales clerk for Orscheln Farm & Home from September 22, 2003 to December 7, 2006. On March 30, 2006, the claimant received a verbal warning about her attendance and being on time and the claimant indicated her physician had switched her anxiety medication and her illness should be under control in one week. On April 12, 2006, she was scheduled to work 12:00 p.m. to close but called at 10:00 a.m. and said she had to take her mother to the doctor and pharmacy and would be in at noon. She arrived at 1:58 p.m. On April 14, 2006, she was scheduled to work 10:00 a.m. to close. She called in at 9:00 a.m. and said she had to go see her attorney and would be in at noon but arrived after 1:00 p.m. On April 15, 2006, she was scheduled to work 12:00 p.m. to close and clocked in at 1:14 p.m. because she took her mother to the doctor. On April 17, 2006, the claimant called at 9:15 a.m. and said she would be in around 11:30 or noon because of personal business. On April 19, 2006, the claimant was scheduled to work 8:00 a.m. to 5:00 p.m. She called at 7:55 a.m. and arrived at 8:30 a.m. because she went to the bank to deposit her fiancé's check and the employer issued her a written warning. On August 19, 2006, the claimant was late because her son left her truck somewhere the night before and she had to go look for it before it was towed. On August 31, 2006, the claimant called and said she would be late because she had to stop and get something to eat on her way to work. On September 7, 2006, she was

scheduled to work at 7:30 a.m. but arrived at 7:45 a.m. because her son was in the bathroom and she could not get ready for work on time. On October 3, 2006, she called in and asked for the day off because there had been a break in at her house. The employer told her it needed her at work ASAP and the claimant arrived at 1:00 p.m. for her 9:00 a.m. shift. On October 8, 2006, the claimant was 15 minutes late. On October 12, 2006, the claimant was 15 minutes late because a space heater started a fire in her house and she had to pull the space heater out of the house. On October 21, 2006, the employer received a customer complaint that the claimant was rude. It called her into the office to discuss that situation as well as the claimant's on-going tardiness and issued a verbal warning to her at that time. On October 30, 2006, the claimant was scheduled from 9:00 a.m. to 6:00 p.m. She told the employer she had a 9:30 a.m. appointment to have her house appraised. The employer granted her request to be a "little late" but the claimant continued calling the employer telling it she was going to be later and later. At 11:00 a.m. she asked for the day off and the employer said no and the claimant arrived at 12:15 a.m. On November 5, 2006, she was 10 minutes late because she forgot her glasses and the employer issued a second written warning regarding her attendance. On December 5, 2006, the claimant was scheduled to start work at 7:30 a.m. and arrived at 7:45 a.m. because her fiancé's mother fell and she had to help him help her up and get her to the bus stop and her neighbor's father died and her fiancé had to take the neighbor to the airport. After reviewing the claimant's attendance the employer terminated her employment December 7, 2006.

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 for disqualifying job 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 Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was

tardy at least 15 times between March 30, 2006 and December 5, 2006, and was aware her job was in jeopardy because of her attendance. 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. The final absence, in combination with the claimant's history of absenteeism, is 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 January 5, 2007, reference 01, decision is reversed. The 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. The claimant is overpaid benefits in the amount of \$1,421.00.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs