

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANETTE N WRIGHT
Claimant

APPEAL NO: 10A-UI-10347-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 06/20/10

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's July 20, 2010 decision (reference 01) that concluded Shanette N. Wright (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 8, 2010. The claimant participated in the hearing. Lynn Corbeil of TALX UC Express, f/n/a Johnson & Associates, appeared on the employer's behalf and presented testimony from two witnesses, Tammy Kappel and Dave Mollenhoff. During the hearing, Employer's Exhibits One through Seven were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 11, 2006. She worked full time as a certified nursing aide (CNA) in the employer's Waterloo, Iowa skilled nursing facility. At her request, as of approximately May 1, 2010 her regular schedule was to work from 10:00 a.m. to 10:00 p.m., Friday, Saturday, and Sunday. Her last day of work was June 18, 2010. The employer discharged her on June 21, 2010. The reason asserted for the discharge was excessive absenteeism.

Prior to June 19, the claimant had been given a number of warnings for attendance, including a final warning on November 9, 2009 for accumulating 9 absences and 15 tardies in the prior year. About two of these prior absences were due to illness. After the final warning the claimant had an absence due to illness on January 17, 2010, and had additional tardies on December 21, 2009 and April 2, 2010.

On June 19 the claimant called in to report she would not be at work as she had no transportation. Ms. Kappel, the director of nursing, contacted the claimant and offered to provide transportation. The claimant declined, indicating she needed to go to her mother's house and get her laundry. Ms. Kappel repeated her offer, but the claimant indicated that she did not know when she would be ready, so she would not commit to coming in at any time and did not accept the offer of transportation.

This further occurrence brought the claimant to ten points under the employer's attendance policy. As a result, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective June 20, 2010. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Absences due to issues that are of purely personal responsibility, including transportation issues, are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant's final absence was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded to the Claims Section.

DECISION:

The representative's July 20, 2010 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of June 20, 2010. This disqualification continues until she has been paid ten times the weekly benefit amount for insured work, provided she is otherwise then eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs