

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEGAN NEEDS

Claimant

APPEAL NO: 08A-UI-11125-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES

Employer

**OC: 10-12-08 R: 01
Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 17, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 11, 2008. The claimant chose not to participate in the hearing. Melanie Kempf, Administrator and Josh Burrows, Employer Attorney, participated in the hearing on behalf of the employer. Employer's Exhibits One, Two and Three were admitted into evidence.

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 full-time CNA for Care Initiatives from September 11, 2008 to October 17, 2008. As a new employee she was on a 90-day probationary period. During the probationary period employees receive a verbal warning after one unscheduled attendance occurrence, a written warning after two unscheduled occurrences and are terminated upon reaching three unscheduled occurrences (Employer's Exhibit One). Unscheduled occurrences are "defined as any event where the employee fails to report to work and has not been granted a pre-approved (scheduled) absence. Each day of unscheduled absence will count as one occurrence" (Employer's Exhibit One). On September 15 and 16, 2008, the claimant was 15 minutes late and received a verbal and written warning on the same form September 16, 2008 (Employer's Exhibit Two). On September 23, 2008, the claimant was tardy and on September 26, 2008, she was tardy and the employer spoke to the claimant about her tardiness. On October 15, 2008, the claimant called in at 7:30 a.m. for her 7:30 a.m. shift and reported she would not be in because she was ill. Employees are required to call in at least two hours prior to the start of their shift (Employer's Exhibit One). The employer terminated the claimant's employment for exceeding the allowed number of attendance occurrences (Employer's Exhibit Three).

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant had four incidents of tardiness during her first 15 days of employment. She could have been discharged at that time but the employer gave her two more chances after she was tardy September 23 and September 26, 2008. She was absent October 15, 2008, due to illness but failed to properly report her illness by calling in at least two hours in advance allowing the employer to find a replacement for her. Because the final absence was not properly reported, and the claimant had four other attendance occurrences in approximately five weeks of employment, the administrative law judge must conclude that the claimant's absences constitute disqualifying job misconduct. Therefore, benefits are denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The November 17, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. 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 matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs