

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRI L HARTZELL**  
Claimant

**APPEAL NO. 11A-UI-14731-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMMUNITY NURSING HOME INC CLARKS**  
Employer

**OC: 10/16/11**  
**Claimant: Respondent (2-R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the November 9, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on December 14, 2011. Claimant participated. Employer participated through Administrator Lynn Nelson and Environmental Service Supervisor Linda Van Hauen. Employer's Exhibit 1 (documents 1 - 15) was admitted to the record.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits and whether she is overpaid benefits as a result.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a housekeeper/laundry staff from June 2006 and was separated from employment on October 12, 2011. On that date, she was a no-call, no-show for her 7 a.m. shift. Her supervisor, Van Hauen, was unable to reach her by telephone, so she had her son go to the claimant's house at 8 a.m. to try to wake her up but got no response. (Employer's Exhibit 1, doc 11) Two hours' notice is required to report absences and she had been warned about that on April 19, 2011 when she was a no-call, no-show for a scheduled in-service. (Employer's Exhibit 1, doc. 9) At 11:30 a.m. claimant called Van Hauen to let her know she would not be at the in-service at 1 p.m., because she was sick. She did not know she was scheduled to work that day. Van Hauen claims another unnamed employee told her they saw her driving around town but cannot recall who or the circumstances. Claimant went to the store for prescription inhaler. Two days earlier while working, she said she was going to a doctor because she was coughing. She called in sick on October 11, got someone to work for her, and went to the doctor, so that absence was excused. Claimant did not present a medical excuse until October 13 but the date range from "September 10 to September 13" was altered to read "October" in handwriting that is similar to claimant's note submitted with the excuse. (Employer's Exhibit 1, doc. 13, 14) The author of the original type-written note told the employer that the excuse was printed on October 13 but she does not recall who changed the month.

(Employer's Exhibit 1, doc 15) Performance reviews on March 10, 2010 and May 11, 2011 both noted the employer's concern about her attendance. (Employer's Exhibit 1, doc. 3, 10) Claimant had been warned about "paying closer attention to the schedule" on May 11, 2011, probation in February 16, 2010 and August 18, 2011, and suspension because of poor attendance, tardiness, on August 5, 2010, and missing a scheduled in-service on April 19, 2011. (Employer's Exhibit 1, doc. 2, 4, 7)

The claimant has received unemployment benefits after the separation on a claim with an effective date of October 16, 2011.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982) (emphasis supplied). An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. Although the claimant may or may not have presented a valid excuse for October 10 through 13, 2011, she failed to properly report the final absence on October 12. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and that the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The administrative law judge further concludes claimant has been overpaid benefits. 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 not eligible for those benefits.

**DECISION:**

The November 9, 2011 (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.

**REMAND:**

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw