

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHARON EINERTSON**  
Claimant

**APPEAL NO: 09A-UI-02361-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 01-04-09**  
**Claimant: Respondent (2-R)**

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 February 5, 2009, 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 March 9, 2009. The claimant participated in the hearing. Jeanie Fletchall, RN/DON; Susan Dillon, Administrator; and Lynn Corbeil, Employer's Attorney, participated in the hearing on behalf of the employer. Employer's Exhibits One through Seven 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 December 5, 2007 to December 1, 2008. The claimant was absent with a doctor's excuse from November 14 to November 24, 2008. She met with the employer November 24, 2008, and they worked out a new schedule and the claimant was provided with a copy. On November 25, 2008, the claimant did not show up or call for her 6:00 a.m. shift so the employer called her and she arrived at 6:53 a.m. On November 27, 2008, the claimant did not show up or call for her 6:00 a.m. shift so the employer again called her and she arrived at 6:12 a.m. The employer issued a verbal warning to the claimant and told her she needed to be at work by 6:00 a.m. On November 28, 2008, the claimant did not show up or call for her 6:00 a.m. shift and the employer called and woke her up and the claimant arrived at 6:10 a.m. On November 29 and 30, 2008, she was a no-call no-show. The employer attempted to call her and left messages but the claimant did not return their calls until December 1, 2008. The employer asked her to come in at 2:00 p.m. that day to talk about her attendance situation. The claimant said she had a doctor's appointment at 1:30 p.m. but would be in right after that. The employer waited until 3:00 or 3:15 p.m. before starting to leave for the day at which point the claimant arrived. The employer explained the meeting was at 2:00 p.m. and she was leaving but told the claimant her employment was

terminated for the two no-call no-shows and the incidents of tardiness in violation of the employer's policy between November 25 and December 1, 2008.

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). While the claimant testified she did not know she was scheduled to work November 25 and 26, 2008, the employer gave her a copy of the new schedule and went over it with her November 24, 2008. She agrees she was late November 27 and 28, 2008, but stated she called the evening charge nurse November 28, 2008, and said she was going to the hospital and was hospitalized for four days but notified the same evening charge nurse November 30, 2008. The employer has no record of her calling in to report she was going to or in the hospital. She said she was released from the hospital December 1, 2008, and received the employer's messages and returned their call but had a doctor's appointment at 1:30 p.m. and told the employer she would be late for the meeting. She also testified she provided the administrator with a doctor's excuse for her tardiness to the meeting December 1, 2008, but the employer denies ever receiving any paperwork from the claimant about that incident. The claimant's absences were not properly reported and the employer's testimony about the events between November 24 and December 1, 2008, was credible and their testimony was more persuasive than that of the claimant. 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.

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 February 5, 2009, 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 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.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs