

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SALLY MERRITT-RASH
Claimant

APPEAL NO: 11A-UI-13881-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HOMESTEAD LIVING/LEARNING CTR
FOR THE HOMESTEAD**
Employer

**OC: 09-18-11
Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 11, 2011, 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 November 18, 2011. The claimant participated in the hearing. LuAnn Markley, Operations Director, 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 full-time autism associate for Homestead Living/Learning Center for the Homestead from December 16, 2008 to August 31, 2011. She was discharged for attendance and performance issues. The claimant was scheduled to work at Site Seven with an autistic adult who cannot be left alone at 12:00 p.m. August 29, 2011, but did not arrive until 12:38 p.m. She did not call to tell the employer she would be late. There was construction on the route she drove all summer and although she left 15 minutes before her shift started she did not allow enough time for the construction. The claimant's cell phone was not working, even though she had charged it, because she needed a new battery and did not realize it was not holding the charge. Neither her car charger nor home charger would work because the cell phone battery was dead. The bus driver who transported the client stayed in front of the client's home because he knew the claimant was not there yet. At 12:30 p.m. the client called the employer and stated the claimant was not there yet and had not called him to say she would be late or that the on-call person would be coming over. The employer uses a no-fault attendance policy and an automated time keeping system where employees call an 800 number when they arrive and leave and clock in and out using various codes and when they fail to use the system it counts as an unscheduled absence. The claimant was tardy February 10, 2011; absent due to properly reported illness February 17 and 18, 2011, tardy April 18, 2011; tardy May 14, 2011; failed to use the mandatory time keeping system July 1 and 2, 2011; tardy July 6, 2011; and

failed to use the mandatory time keeping system July 7, 19 and 20, 2011. She received a written warning April 6, 2010, for violating the documentation policy by failing to document each item required and because her notes contained numerous errors. She received a written warning November 25, 2010, for violating the documentation policy by failing to turn in progress notes and because her notes contained numerous errors, including a falsification of records on one report done for a client who was not there. She received a final written warning July 26, 2011, and was suspended one day for excessive absenteeism and tardiness and failing to provide the required documentation on progress reports, numerous errors and missing notes. She was told that further incidents could result in termination of her employment. The documentation is very important to the employer as it shows the goals, objectives and progress of its clients but also serves as one of the billing records for the agency. The claimant agrees she made numerous errors but while the employer stated the documentation was to be completed daily, it was the claimant's understanding that the notes were to be done each day and then the employer would call associates in to correct errors or provide missing notes by 3:00 p.m. Fridays, which she routinely did. The employer terminated the claimant's employment August 31, 2011, following her tardiness without calling August 29, 2011.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant was 38 minutes late without calling the employer or client August 29, 2011, and should have left earlier because she was aware she had to pass through a construction zone, the fact that her cell phone battery died was beyond her control. She charged it the night before and believed it was in working order when she left for Site Seven but did not leave early enough to account for the road construction. That incident alone, however, is not enough to find disqualifying job misconduct. The claimant was warned three times, including a final written warning and suspension July 26, 2011, for failing to properly document progress notes and complete other paperwork the employer relies on for tracking the goals and objectives of clients as well as for billing purposes. The claimant admitted her notes were filled with errors and although she stated her belief that the notes simply had to be completed and corrected by Fridays at 3:00 p.m. if the employer called her to fix them, she was on notice that her practice was not sufficient and did not meet the employer's expectations given that she received three written warnings regarding her documentation. Three written warnings in little more than one year's time gave her notice that her documentation was not acceptable to the employer yet she continued to document with numerous errors and omissions until her termination. Additionally, the claimant was warned about her attendance and although her two absences due to illness should not count against her, she was tardy at least five times in six months and failed to properly use the employer's time keeping system, which it also uses as a billing record, several times. Five incidents of tardiness in other occupations may not be excessive. When clients cannot be left unattended, however, tardiness becomes more critical. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be 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 October 11, 2011, 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 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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