

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUE A COX
Claimant

APPEAL NO: 07A-UI-05033-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CHRISTIAN RETIREMENT SERVICES INC
OAKNOLL RETIREMENT RESIDENCE**
Employer

**OC: 04/15/07 R: 04
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Christian Retirement Services, Inc./Oaknoll Retirement Residence (employer) appealed a representative's May 8, 2007 decision (reference 01) that concluded Sue A. Cox (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 June 4, 2007. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Diane Ely appeared on the employer's behalf and presented testimony from two other witnesses, Sheila McBride and Theresa Stoker. Based on the evidence, the arguments of the employer, 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 March 1, 2006. She worked full time as a charge nurse at the employer's long-term care nursing facility. Her regular schedule was 3:00 p.m. to 11:00 p.m. Tuesday, Thursday, and Friday plus every other weekend. Her last day of work was April 19, 2007. The employer discharged her on that date. The reason asserted for the discharge was absenteeism, particularly failure to properly follow call-in procedures.

The claimant had 20 absences in 2006 and prior to April 13 had five absences in 2007. she had been given a warning regarding attendance on November 8, 2006. On Friday, April 13 the claimant was a no-call, no-show for her shift. The employer called her home and left a message inquiring where she was and asking why she had not called in an absence. The claimant responded by returning the call at approximately 5:00 p.m., indicating that she did not know she was scheduled to work that day, although she was always scheduled to work on Fridays. She

then indicated she would come in for the remainder of her shift, but in fact did not report until approximately 7:00 p.m.

The claimant was scheduled to work next on Saturday, April 14. She was a no-call, no-show for the scheduled start of her shift at 3:00 p.m. At approximately 4:45 p.m. her husband called the employer to report the claimant would not be in because she was visiting a daughter in Muscatine, Iowa and had become ill with a migraine necessitating going in to a medical facility for a shot. No explanation was offered as to why there had not been a call in prior to the start of the shift as required. The employer then determined to discharge the claimant, but was unable to inform her until April 19 as she did not report for her shifts on April 15, for which she properly arranged coverage, and on April 17, for which there was a proper call-in.

The claimant established a claim for unemployment insurance benefits effective April 15, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$973.00.

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 section 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 section 96.5-2-a.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 work-connected misconduct since they are not volitional. Cosper, supra. However, the illness-related absence in this matter was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's May 8, 2007 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 15, 2007. This disqualification continues until she

has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$973.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs