

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GRECHET BISHOP
Claimant

APPEAL NO. 08A-UI-02203-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRANDVIEW HEIGHTS INC
Employer

**OC: 01/27/08 R: 02
Claimant: Respondent (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Grandview Heights, Inc. (employer) appealed an unemployment insurance decision dated February 25, 2008, reference 01, which held that Grechet Bishop (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 19, 2008. The claimant participated in the hearing. The employer participated through Craig Koonce, Human Resources Manager; Tom Hoskins, Administrator; Denise Adkins, Scheduler; and Denise Williams, Third Shift Supervisor. Employer's Exhibits One through Four and Claimant's Exhibit A were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a full-time certified nurse's aide on January 24, 2007 but subsequently reduced her hours to part-time. She was discharged on February 2, 2008 for excessive unexcused absenteeism after being warned. Employees are required to report their own absences at least two hours prior to his or her scheduled shift. The claimant received five warnings for attendance in 2007. They were issued on April 5, May 14, July 31, August 21 and November 15.

In 2008, she was a no-call/no-show on January 2 and received a written warning for attendance on January 10. Subsequent to that, she was absent on January 12 but had her sister report her absence for her. The employer met with the claimant on January 16, 2008 to counsel her regarding her poor attendance. The claimant was previously allowed to reduce her hours due to attendance problems and was only working three days per week but was still having attendance

issues. The director of nursing advised the claimant that she had to report to work as scheduled and had to call the scheduler herself if she was absent due to illness. The claimant was warned that further absences would result in her discharge. The claimant assured the employer her attendance would improve.

On the morning of January 29, the claimant called Denise Adkins, the scheduler, and asked if she could take off work that night. Ms. Adkins told the claimant she had to wait to see if any staff members were ill but if they were not, she could take off work. At approximately 6:29 p.m. Ms. Adkins called the claimant to let her know she had to report to work because of staff illness. The claimant was scheduled to start work at 10:00 p.m. At approximately 9:00 p.m., the claimant's sister called the employer and said the claimant fell and was going to the hospital. Ms. Adkins told the sister that the claimant needed to call herself to report her absence. The claimant did go to the emergency room and the medical records indicate she did not appear to be in acute distress, was alert and oriented. She was released in stable medical condition and the dictation of that record was completed at 11:01 p.m. The claimant did not report to work per doctor's excuse but failed to call the employer. She could have called the scheduler, the nurse on-call, and/or the facility but failed to contact anyone. She was discharged on February 2, 2008.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 § 96.5-2-a.

Iowa Code § 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.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on February 2, 2008 for absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Id. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's final absence was due to illness but was not properly reported even though it could have been. 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 denied.

Iowa Code § 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 unemployment insurance decision dated February 25, 2008, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until 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 is overpaid benefits in the amount of \$1,714.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css