

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FELICIA WHITEHORSE
Claimant

APPEAL NO. 08A-UI-11665-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SITEL CORPORATION
Employer

OC: 10-05-08 R: 01
Claimant: Respondent (2R)

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 December 3, 2008, reference 02, 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 December 29, 2008. The claimant participated in the hearing. Angela Staley, Human Resources Manager, 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 part-time customer service professional for Sitel Corporation from January 8, 2008 to August 26, 2008. On August 4, 2008, she began working the evening shift from 5:00 p.m. to 10:00 p.m. Monday through Thursday. She was discharged for excessive, unexcused absenteeism. The employer uses a no-fault attendance policy and employees are terminated upon reaching eight occurrences during a one-year rolling period. Incidents of tardiness or leaving early result in one-half occurrence if less than one-half of the employee's shift in duration and full day absences result in one occurrence. An employee receives a form following each absence stating the total number of occurrences they have accumulated and the employee signs and returns the form to human resources. They also receive written warnings after five, seven and eight occurrences. On July 2 and 3, 2008, the claimant left early and received one-half occurrence for each incident; on July 9, 2008, she left more than four hours early and received one occurrence; on July 14, 2008, she was absent and received one occurrence; on July 22, 2008, she left early and received one-half occurrence; on July 23, 2008, she was tardy and left early and received one occurrence; on July 24 and 31, 2008, she left early and received one-half occurrence for each incident; on August 1, 2008, she was tardy and left early and received one occurrence; on August 7, 2008, she left early and received one-half occurrence; and on August 14 and 18, 2008, she was absent because she lost her evening

childcare and had to stay home with her children. Consequently, she exceeded the allowed number of attendance occurrences and her employment was terminated for excessive, unexcused absenteeism. The claimant received a written warning after five occurrences; a second written warning after seven occurrences; and a final written warning after eight occurrences.

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 administrative law judge is not unsympathetic to the claimant's difficulty in finding evening childcare in a small town, it is still her responsibility to secure childcare so that it does not interfere with her attendance. Additionally, the claimant had several other incidents of leaving early and being tardy and exceeded the allowed number of attendance points. 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. 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 December 3, 2008, reference 02, 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css