IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JENNIFER L VAN GORP
1315 SPENCER ST
GRINNELL IA 50112

CARE INITIATIVES
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 05A-UI-06056-JTT
OC: 05/15/05 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.6(2) – Timeliness of Appeal
Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Jennifer Van Gorp (claimant) filed a timely appeal from the May 27, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 21, 2005. Ms. Van Gorp participated in the hearing. Attorney Lynn Corbeil of Johnson & Associates represented the employer and presented testimony through Karen Daniel, Director of Nursing. Workforce Development representative Ronee Slagle provided testimony. Department Exhibits D-1 and D-2 were received into evidence. Exhibits One, Two, Three, and Exhibit A were also received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer Van Gorp was employed by Park Ridge Nursing and Rehabilitation Center as a full-time Certified Nursing Assistant (C.N.A.) from October 10, 2002 until May 11, 2005, when she was discharged for misconduct based on excessive unexcused absences.

The absence that prompted the discharge occurred on May 8, 2005, when Ms. Van Gorp was a "no-call, no-show." Ms. Van Gorp had traded shifts with a fellow nursing assistant and forgot to show up for the shift she had agreed to work. The traded shifts were reflected on the schedule that was posted at the nurses' station. Prior to May 8, the co-worker with whom Ms. Van Gorp had traded shifts reminded Ms. Van Gorp of her obligation to work the shift on May 8. The employer attempted to contact Ms. Van Gorp, but was unsuccessful. A couple of Ms. Van Gorp's fellow nursing assistants attempted to contact her on her cell phone, but were unsuccessful. Ms. Van Gorp was not carrying her cell phone that day and did not receive the calls.

On May 9, Ms. Van Gorp contacted the employer at 1:50 p.m., to notify the director of nursing, Karen Daniel, that she would be late getting to work for the shift that was to begin at 2:00 p.m. Ms. Van Gorp's father's work vehicle had broken down and she needed to provide him with a ride. The employer's attendance policy required Ms. Van Gorp to alert the employer at least two hours before the scheduled start of her shift if she needed to be absent. During this conversation, Ms. Daniel raised the issue of the "no-call, no-show" on May 8 and Ms. Van Gorp advised she had forgotten the shift. Ms. Daniel advised Ms. Van Gorp that she would not be allowed to return to work until she appeared before the employer's quality assurance team. Based on this information, Ms. Van Gorp did not appear for her shift on May 9. On May 11, 2005, Ms. Van Gorp went before the employer's quality assurance team, which determined that her employment should be terminated.

During a shift on April 4, 2005, Ms. Van Gorp had not felt well and had left the nursing facility for five to ten minutes to purchase cough drops. Ms. Van Gorp attempted to locate her charge nurse before she left the facility, but was unsuccessful in locating that person. Ms. Van Gorp had not clocked out prior to leaving the facility. When she returned, she learned that the assistant director of nursing was looking for her. Ms. Van Gorp subsequently received a written reprimand for leaving the facility without prior approval and without clocking out.

Ms. Van Gorp submitted her appeal in this matter by delivering it to the Workforce Development Center in Grinnell on June 7. The staff at that facility forwarded the appeal to the Appeals Bureau via facsimile on June 7. The Agency representative's decision, dated May 27, 2005, reference 01, was mailed to Ms. Van Gorp's last known address of record on May 27, 2005. Ms. Van Gorp received the decision on or before June 1, 2005. Ms. Van Gorp did not review the entire document when she received it. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 6, 2005. After Ms. Van Gorp received the decision, she went to the Grinnell Workforce Development Center and asked about the appeal procedure. Agency representative Ronee Slagle met with Ms. Van Gorp and provided her with an appeal form. Ms. Van Gorp completed the form on June 1 or 2, but did not deliver the appeal to the Grinnell Workforce Development Center until Monday, June 6, 2005, the day the appeal was due. When Ms. Van Gorp made contact with the Workforce Development staff on June 6, the staff member advised Ms. Van Gorp that the staff member did not know anything about unemployment insurance appeals and that Ms. Van Gorp would have to return the next day. Ms. Van Gorp returned to Workforce Development the next day as

instructed and submitted her appeal, which was forwarded to the Appeals Bureau. The appeal was received at the Appeals Bureau one day after the due date.

REASONING AND CONCLUSIONS OF LAW:

The first issue the administrative law judge must decide is whether the claimant's appeal should be deemed timely.

The submission of an appeal beyond the specified statutory or regulatory period shall be considered timely if the evidence establishes that the delay in submission was due to division error or misinformation. See 871 IAC 24.35(2). No submission shall be considered timely if the evidence establishes that the delay in filing was unreasonable, considering the circumstances of the case.

The evidence in the record establishes that Ms. Van Gorp waited until the day the appeal was due to take it to her local Workforce Development Center. The appeal was due at midnight on June 6, 2005. Had the Workforce Development representative with whom Ms. Van Gorp came in contact known the correct procedure for forwarding the appeal to the Appeals Bureau, the appeal would have been received within the ten-day statutory deadline. The Workforce Development representative erred when she instructed Ms. Van Gorp to return the next day, instead of locating another representative who could help Ms. Van Gorp. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that that Ms. Van Gorp's appeal should be considered timely.

The remaining issue is whether the evidence in the record establishes that Ms. Van Gorp was discharged for misconduct based on excessive unexcused absences.

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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Van Gorp's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that the unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Ms. Van Gorp's brief absence on April 4, her "no-call/no-show" on May 8 and her tardiness on May 9 were unexcused absences. The evidence fails to indicate any other unexcused absences. The administrative law judge concludes that Ms. Van Gorp's unexcused absences were not excessive. Ms. Van Gorp was discharged for no disqualifying reason. Accordingly, Ms. Van Gorp is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Van Gorp.

DECISION:

The representative's decision dated May 27, 2005, reference 01, is reversed. The claimant was discharged from her employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

jt/kjf