

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEPHANIE CAMPOS**

Claimant

**APPEAL NO: 10A-UI-01184-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARRIOTT HOTEL SERVICES INC**

Employer

**OC: 12-06-09**

**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 January 14, 2010, 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 April 14, 2010. The claimant provided a phone number prior to the hearing and answered the phone when called for the hearing. The employer's phone number was then busy and the administrative law judge informed the claimant she had to disconnect her call with the claimant and would call her back as soon as she reached the employer which should not take more than a few minutes at the most. The administrative law judge was able to reach the employer on the next try and then attempted to call the claimant back but her voice mail picked up immediately and said it was full. After several more attempts during which the claimant's phone either rang several times without answer or the answering machine came on and said it was full but allowed the administrative law judge to leave a call back number which she did. After ten minutes the administrative law judge started the hearing. Jody Shannon, Human Resources Manager, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

**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 part-time banquet server for Marriott Hotel Services from November 3, 2008 to November 18, 2009. She was discharged for tardiness and failure to arrive at her workstation on time after clocking in. On December 15, 2008, the claimant received a coaching and counseling about her tardiness (Employer's Exhibit One). On January 10, 2009, the claimant clocked in 12 minutes late and failed to report to her workstation for one hour after she clocked in to work (Employer's Exhibit One). On January 15, 2009, she clocked in at 3:06 p.m. but did not report to her workstation until 3:20 p.m. She received a written warning for both incidents January 15, 2009 (Employer's Exhibit One). On April 1, 2009,

she received a written warning for calling off work March 27, 28 and 31, 2009, which violated the employer's policy against calling in three nonconsecutive days within a 30-day period and failing to call in at least one hour before her shifts. She called in at 2:34 p.m. for her 3:30 p.m. shift March 27, 2009; had her husband or boyfriend call in for her March 28, 2009, shift rather than calling in herself as required by the employer's policy; and e-mailed her manager instead of speaking to him directly March 31, 2009 (Employer's Exhibit One). On May 16, 2009, the claimant was a no-call/no-show and received a written warning (Employer's Exhibit One). The claimant received a written warning and second-chance agreement October 1, 2009, because she accrued three incidents of tardiness, September 17, 24 and October 1, 2009, within a 30-day period (Employer's Exhibit One). The employer's policy called for a disciplinary suspension at that stage of the process but the claimant stated she was having trouble with her asthma so she did not serve a suspension (Employer's Exhibit One). The claimant signed a document at that time stating she understood she was being given a second chance and if she received another written warning for any infraction her employment would be terminated immediately (Employer's Exhibit One). On November 17 and 18, 2009, the claimant clocked in on time but did not report to her work area until 12 minutes after her start time November 17 and 20 minutes after her start time November 18, 2009. The employer terminated her employment November 18, 2009, for excessive tardiness and failure to report to her work area on time on several occasions.

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). 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). The claimant was warned on five occasions and was given a second chance to improve on being on time and arriving at her workstation immediately after clocking in. Despite those warnings and the second-chance agreement the claimant's attendance and failure to report to her work area continued. The employer has established that the claimant was warned that further unexcused absences and failure to be at her workstation on time could result in termination of employment and the final incident was not excused. 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). Benefits are 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 January 14, 2010, reference 02, 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.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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