

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELANIE MORRIS

Claimant

APPEAL NO: 07A-UI-03392-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHAUTAUQUA GUEST HOME

Employer

**OC: 03-11-07 R: 02
Claimant: Respondent (2)**

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 March 28, 2007, reference 01, 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 18, 2007. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Kathy Cerwinski, Director of Nursing, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were 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 a part-time CNA for Chautauqua Guest Home from June 2, 2005 to March 9, 2007. She worked the third shift and her hours were 10:00 p.m. to 6:00 a.m., an average of three days per week. She was discharged from employment due to a final incident of absenteeism that occurred on March 5, 2007. In 2006 the claimant was absent January 13, 2006, because of a family illness; on January 16, 2006, she was absent for personal reasons; on January 27, 2006, she was tardy; on March 23, 2006, she was absent because she did not have a babysitter; on April 15, 2006, she was absent due to weather; on April 11, 13 and 14, 2006, she was absent due to illness; on May 3, 2006, she was absent because she did not have a babysitter; on May 20, 2006, she was absent because of personal reasons; on June 12, 2006, she was absent because of illness; on June 18, 2006, she was tardy; on August 2, 2006, she was absent due to illness, on August 13, 2006, she was absent due to a family illness; on September 10, 2006, she left at 10:30 p.m.; on September 20, 2006, she did not have a babysitter; on October 5, 2006, she was absent because of illness; on October 12, 2006, she was absent due to a family illness; on October 14, 2006, she was absent due to illness; on November 3, 2006, she was absent; on December 12, 2006, she was absent for personal

reasons; on December 16, 2006, she was absent because she did not have a babysitter; on January 28, 2007, she was absent because she did not have a babysitter; on January 31, 2007, she was absent due to illness; on February 10, 2007, she was absent because of transportation problems; on March 5, 2007, she was absent because of an accident of her self or her family (Employer's Exhibit Two). On June 18, 2006, the claimant received an evaluation that stated she needed to improve her attendance and initiative (Employer's Exhibit Four). The warning also stated that frequent call in's created a poor attitude among other employees when they have to work short. (Employer's Exhibit Four). The claimant received a verbal warning October 31, 2005, for irregular attendance and was told she needed to correct "attendance problems or further discipline per the employee handbook will result (Employer's Exhibit Three). On April 19, 2006, she received a written warning for irregular attendance and the warning stated, "Chautauqua Guest Homes expects all employees to assume diligent responsibility for their attendance and promptness. Melanie has been absent four times in April 2006. Absenteeism places coworkers under undue stress and residents in jeopardy of injury (Employer's Exhibits Three). On March 5, 2007, the claimant called and said she had fallen but did not provide a doctor's excuse for her absence and consequently the employer determined her absences were excessive and terminated her employment effective March 9, 2007 (Employer's Exhibit Two).

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). The claimant was absent a total of 25 times between January 13, 2006 and March 5, 2007, while working a

part-time schedule. Although ten of those absences were due to the illness of herself or of an immediate family member, that still leaves 15 unexcused absences. 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 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 March 28, 2007, reference 01, 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 claimant is overpaid benefits in the amount of \$471.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs