

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIE HERSHEY
Claimant

APPEAL NO: 06A-UI-08174-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 07-09-06 R: 03
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 8, 2006, 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 August 29, 2006. The claimant participated in the hearing. Guy Matson, Administrator; Jeanne Franson, Human Resources Staff Development; and Karen Pafford, Director of Nursing, 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 a part-time CNA for Good Samaritan Society from August 21, 2003 to July 3, 2006. She received a written warning for inconsiderate treatment of co-workers November 21, 2005, and a written warning for failing to attend required training November 28, 2005. The employer's attendance policy allows eight occurrences within a calendar year before the employee is discharged. The claimant accumulated 13 absences within a calendar year as of July 3, 2006. On June 21, 2006, the claimant was scheduled to work until 10:30 p.m. She asked if she could leave early and was told she could not but did so anyway. When confronted about it June 22, 2006, she stated she "forgot" and the employer issued a written warning for insubordination. On June 26, 28 and 29, 2006, the claimant left early and on June 30, 2006, she used paid time off because her granddaughter was teething. The employer asked her to come in June 30, 2006, because it planned to issue a final warning. The claimant asked what she could do to correct the problem and the employer reminded her she could make up her shifts and lose occurrences but the claimant stated she could not work any extra shifts. She also stated she knew she would miss more work because her granddaughter would be cutting more teeth. She was scheduled July 1 and 2, 2006, and found a replacement worker for July 1 but not July 2, 2006. The employer terminated her employment July 3, 2006.

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 exceeded the allowed number of attendance occurrences by leaving early several times and also missing entire days at the end of her employment due to her granddaughter teething. She has not demonstrated that her leaving early or her absences were due to unavoidable circumstances or illness. 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 August 8, 2006, 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 claimant is overpaid benefits in the amount of \$1,665.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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