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

MICHELLE D MILLER
Claimant

IOWA JEWISH SENIOR LIFE CENTER
Employer

APPEAL NO. 07A-UI-01168-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/31/06   R: 02
Claimant: Appellant (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Michelle Miller filed an appeal from a representative's decision dated January 24, 2007, reference 01, which denied benefits based on her separation from Iowa Jewish Senior Life Center. After due notice was issued, a hearing was held by telephone on February 16, 2007. Ms. Miller participated personally and was represented by Ken Weiland, Attorney at Law. The employer participated by Joy Foster, Assistant Director of Nurses.

ISSUE:

At issue in this matter is whether Ms. Miller was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Miller was employed by Iowa Jewish Senior Life Center from August 6, 2002 until December 28, 2006. She was employed full time as a certified nursing assistant. She was discharged because of her attendance and because of performance issues.

Ms. Miller was scheduled to be at work at 6:30 a.m. on December 26, 2006. She did not arrive until 7:00 a.m. but did not use the time clock when she arrived. That afternoon, she told a supervisor that she had forgotten to clock in that morning and asked the supervisor to note on her time card that she had arrived at 6:29 a.m. She was late on this occasion because her car broke down on the way to work. She called her mother-in-law for assistance using her cell phone but did not contact the employer to advise that she would be late. Ms. Miller had been late reporting to work on 11 occasions between August 21 and September 9, 2006. She received a written warning on November 6 regarding her attendance. She was late 19 times between September 22 and December 3 and, therefore, received a written warning on December 8.

The decision to discharge was prompted by the fact that Ms. Miller failed to follow facility procedure when transferring a resident on December 28. The resident in question, Robert,

requires two people to transfer him. This fact is noted on his care agenda posted in his bathroom. Ms. Miller had worked with Robert on a number of occasions and was aware of his care agenda. She used a Hoyer lift to transfer Robert from his bed to a chair on December 28. The employer requires that two people operate the Hoyer lift. Robert did not sustain any injury as a result of the transfer. The only other performance issue for Ms. Miller during 2006 was in November when she received a counseling because she failed to give a resident a shower and failed to document her reason for not doing so.

REASONING AND CONCLUSIONS OF LAW:

Ms. Miller was discharged from employment. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Miller was discharged due to performance issues and her attendance. Although she was negligent on December 28, 2006 in not having a second person assist with the transfer of Robert, the employer did not present evidence of other occasions on which she had violated policy with regard to transferring residents. The employer likewise failed to establish a pattern or practice of not documenting that cares were not given such as with the incident of November 13, 2006. Therefore, the administrative law judge in inclined to view both the November 13 and the December 28 incidents as isolated lapses in good performance.

Ms. Miller accumulated 30 occasions of tardiness between August 21 and December 3, 2006. Although her tardiness may have been by only a few minutes, the fact remains that the employer had the right to expect her to be at work on time. Ms. Miller should have known from the warning of November 6 that the employer would not tolerate even a few minutes of tardiness. In spite of the warning, she continued to be late reporting to work. The administrative law judge concludes that the discharge was based on a current act of tardiness. Ms. Miller was 30 minutes late on December 26 and was discharged two days later. She did not call the employer to advise that she would be late. She had a cell phone with her and could have called the employer but did not do so. Moreover, Ms. Miller attempted to falsify her reporting time. She did not use the time clock when she reported to work even though it would only have taken a minute to do so. She waited until later in the afternoon before notifying the employer that she had not used the time clock that morning. She asked the employer to sign her in at 6:29 a.m. when she had actually arrived 30 minutes later than that.

The administrative law judge concludes that Ms. Miller's tardiness constituted unexcused absenteeism as the evidence failed to establish any reasonable cause for it. The administrative law judge considers 30 occasions of tardiness over a period of four months to be excessive. Ms. Miller had been warned about her tardiness but failed to take those steps necessary to ensure her timely arrival at work. Her excessive unexcused absenteeism constituted a substantial disregard of the standards the employer had the right to expect. Accordingly, benefits are denied.

DECISION:

The representative's decision dated January 24, 2007, reference 01, is hereby affirmed. Ms. Miller was discharged for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility.

_____
Carolyn F. Coleman
Administrative Law Judge

_____
Decision Dated and Mailed

cfc/pjs