

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHERIA WALKER
Claimant

APPEAL NO. 08A-UI-09155-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SUNNYBROOK ASSISTED LIVING
MOUNT PLEASANT INC**
Employer

**OC: 09-07-08 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 30, 2008, 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 October 23, 2008. The claimant participated in the hearing. Barbara Black, Health Care Coordinator and Kim Anderson, Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight 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 full-time front counter/assistant cook for Sunnybrook Assisted Living Mount Pleasant from December 6, 2007 to September 3, 2008. She was discharged from employment due to a final incident of absenteeism that occurred September 3, 2008. On January 15, 16 and 17, 2008, the claimant was absent due to properly reported illness; on January 22, 2008, she was absent due to the illness of a family member; on March 19 through April 4, 2008, she was absent due to a family crisis; on April 20, 2008, she was absent due to a family medical emergency; on May 8, 2008, she clocked out early; on June 6, 2008, she was absent due to a meeting with her attorney; on June 12, 13, 24, July 3 and July 11, 2008, she left early with permission; on August 4, 2008, she was absent due to a family illness and on September 3, 2008, she had an unexcused absence because she did not have childcare. The employer issued written warnings to the claimant February 5, 2008, for attendance, excessive absences on weekends and excessive personal phone calls (Employer's Exhibit One); April 8, 2008, for failure to restrain her hair or wear a hairnet (Employer's Exhibit Four); May 1, 2008, for failure to wear the proper attire to work (Employer's Exhibit Five); and on June 9, 2008, for deciding that the new rinse for silverware was causing the residents to get sick and calling the manufacturer without talking to the employer (Employer's Exhibit Seven). On June 13, 2008, the employer talked to the claimant about clocking in early and leaving late as she was coming

in at 5:00 a.m. or 6:00 a.m. rather than 6:30 a.m. and stayed until 3:39 p.m. June 7, 2008 (Employer's Exhibit Eight); on July 31, 2008, the claimant received a verbal warning for calling and saying she could not come in because she had to pick up her son but all of her children were home when she called in (Employer's Exhibit Two). The cook was very ill and the employer told the claimant to come to work as soon as possible and she did go in but was late, leaving others to perform her work (Employer's Exhibit Two). On September 3, 2008, she received a written warning for calling in and failing to secure a replacement worker or pick up an alternate shift that evening or the following day (Employer's Exhibit Three). The employer terminated her employment for excessive absenteeism and leaving early. The claimant has two children who see a therapist for a confidential matter that involves "significant stress" caused by a family member and that was the reason for many of her absences and early outs.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

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 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. However, excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant had several absences, all but one of them was due to the illness of herself or her family and the situation involving her children, and when she left early she did so with permission. Excluding the absences due to illness or leaving with permission she had one unexcused absence which occurred September 3, 2008. There were other issues, such as not restraining her hair, wearing the proper attire and clocking in early and leaving late, but those were not described as the reason for the termination. Although the administrative law judge is not unmindful of the claimant's attendance record and the warnings that were issued, the employer only testified about one unexcused absence and that does not constitute excessive, unexcused absenteeism as defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The September 30, 2008, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css