IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHELLE AHNER
Claimant

GREAT RIVER MEDICAL CENTER
Employer

APPEAL NO: 13A-UI-10497-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/18/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 11, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 8, 2013. The claimant participated in the hearing with Attorney Steven Ohrt. Christy Ford, Human Resources Generalist; Roxanne Cruse, RN Clinical Manager; Carolyn Stiefle, Employee Health Coordinator; and Ann Hannum, DON; participated in the hearing on behalf of the employer. Employer's Exhibits One through Seven and Claimant's Exhibits A through F 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 CNA/Universal Worker for Great River Medical Center from July 14, 1980 to August 12, 2013. She was discharged from employment due to violating the employer's attendance policy.

The employer's no-fault attendance policy, prior to March 1, 2013, gave one point for an absence and one-half point for an incident of tardiness exceeding the three minute grace period. A verbal warning in writing is issued when an employee reaches six points; a written warning is issued when an employee reaches eight points; a final written warning is issued when an employee reaches nine points; and termination occurs when an employee reaches ten points. The employer adopted a new tardiness policy March 1, 2013, based on the number of minutes the employee was tardy. If an employee was one to three minutes tardy, she would receive one-quarter of a point; if an employee was four to 30 minutes tardy, she would receive one-half of a point; if an employee was 31 to 59 minutes tardy, she would receive three-quarters of a point; and if an employee was one hour or more tardy, she would receive a full point. The only

way for a point to drop off was for the employee to maintain perfect attendance during a two-week pay period at which time one-half credit would be deducted from the employee's total. At the time the new policy went into effect the claimant had four points that carried over.

On March 9, April 2, 5, 10, 29, May 5, 9, 17-20, June 24, August 5 and 12, 2013, the claimant was one to three minutes tardy. On March 15, 29, April 1, May 1, 8, 13, and July 29, 2013, she was between four and 30 minutes tardy. She was absent March 27, 2013.

The claimant previously reached ten points May 28, 2013, but she progressed from a written warning to a final written warning to termination in such a short time frame the employer was unable to issue her the warnings so instead it gave the claimant a final written warning rather than terminating her employment. The employer told the claimant if she dropped down and then hit ten points again her employment would be terminated.

On April 5, 2013, the claimant received a verbal warning in writing after she accumulated six and one-quarter points; on May 14, 2013, she received a written warning after she accumulated eight points; and on May 28, 2013, she received a final written warning after she accumulated 10 points.

On August 8, 2013, RN Clinical Manager Roxanne Cruse called the claimant at home to let her know she had 9.75 points and to remind her she would be discharged if she reached 10 points. She told her if she was absent, tardy or had a missed punch in she would face termination of her employment. Ms. Cruse called the claimant because she felt it was important to let the claimant know where her points stood.

The claimant was one to three minutes tardy August 12, 2013, and the employer terminated her employment for violating its attendance policy. The claimant testified she had attention deficit hyperactivity disorder (ADHD) and it affects her ability to be on time. She indicated she has "time blindness" where she erroneously believes she has plenty of time unless that time is structured as it is while she is at work. The time blindness and ADHD also result in her often losing items, such as her keys, which would contribute to her tardiness. She told the employer about her condition in May 2013. The claimant is being treated for anxiety, depression and ADHD, and was placed on different medications in an attempt to find the one that worked best for her ADHD.

On August 19, 2013, the claimant spoke to Employee Health Coordinator Carolyn Stiefle and told her about her condition. She asked if she could use Family and Medical Leave (FML) retroactively to cover her tardiness. Ms. Stiefle took the issue to the vice-president of support services and the human resources director and they researched the issue but finally concluded intermittent FML could not be used to cover chronic tardiness in this situation and the claimant's termination stood.

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 accumulated ten attendance points, with all but one of those points resulting from tardiness. She was tardy on 21 occasions between March 9 and August 12, 2013. Nine of those incidents of tardiness were one minute in duration; three were two minutes in duration; and two were three minutes in duration, showing that two-thirds of the claimant's incidents of tardiness were of one to three minutes in length, after the new, much more strict policy regarding tardiness, was implemented March 1, 2013.

The claimant did violate the employer's attendance policy and received the required warnings, and even effectively a second chance in May 2013, but her tardiness continued. When the employer allowed a three minute grace period the claimant's attendance record was much better because she was often covered by the grace period. The new tardiness policy, without any type of grace period, appears to be draconian in nature. However, the claimant was aware of the policy and obviously employers have the right to expect employees to be on time, even if they are only one to three minutes tardy on occasion.

While the claimant suffers from ADHD, FML is not designed to cover chronic tardiness of usually only a few minutes. It can be used to "diagnose and treat her medical condition" but that was not what happened in the case herein. (See *Brown v. Eastern Maine Medical Center*). The *Brown* case dealt with a similar situation wherein Ms. Brown attributed her tardiness to an undiagnosed illness coupled with anxiety and depression. The court in that case found that, "the FMLA does not provide a blanket excuse for Brown's persistent pattern of tardiness; or require an employer to suggest intermittent leave to an employee who is repeatedly late for work" (see *Brown*). The claimant in this case also suffers from anxiety and depression in addition to ADHD. She did not provide, nor did the employer ask, for a medical excuse stating that her tardiness was born out of a medical condition.

The claimant believes the employer should have offered her intermittent FML and had a duty to make her aware of the possibility that program would cover her chronic tardiness. The administrative law judge disagrees in this situation because the claimant used intermittent FML in November 2010 and was therefore most likely more familiar with the program than most employees. The employer followed the law in posting the policy throughout the facility and the claimant had a duty to try to make arrangements with her health care provider and the employer to see if her tardiness would be covered by FML because simply explaining that she had ADHD is not enough for the employer to make the leap that her condition was causing her tardiness. The claimant did not provide the employer or the administrative law judge with any type of medical documentation that proves a clear nexus between having ADHD and chronic tardiness. Additionally, while the administrative law judge frankly does not like the employer's very strict attendance policy regarding tardiness, because it does not allow for a short grace period that could help all employees at some time or another when unexpected home or traffic obstacles occur, FML would not cover chronic tardiness of one to three minutes under these circumstances although the Americans with Disabilities Act might have been used for the claimant to ask the employer to accommodate her short periods of tardiness due to her 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. Therefore, benefits must be denied.

DECISION:

The September 11, 2013, reference 01, decision is affirmed. 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.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs