IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KAREN L PAVAO
3179 – 190TH ST
DEWITT IA 52742

HARDEE'S FOOD SYSTEMS INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-12202-RT
OC: 11-06-05 R: 04
Claimant: Respondent (5)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Hardee's Food Systems, Inc., filed a timely appeal from an unemployment insurance decision dated November 23, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Karen L. Pavao, because she quit work on November 1, 2005 and her leaving was caused by her employer. After due notice was issued, a telephone hearing was held on December 19, 2005, with the claimant participating. Howard Penrod, former manager for the employer, was available to testify for the claimant but not called, because his testimony would have been repetitive and unnecessary. The employer did not participate in the hearing. The employer did not call in any telephone numbers, either before the hearing or during the hearing, where witnesses could be reached for the hearing as instructed in the Notice of

Appeal. The employer is represented by TALX UC eXpress, who is well aware of the need for the employer to call in telephone numbers of witnesses in advance of the hearing if the employer wants to participate in the hearing. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Department Exhibit One was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time kitchen leader, becoming part-time, from July of 1993 until she was discharged on November 6, 2005. On that day the claimant called the employer on two occasions, and on the second occasion was told that the manager, April, had left a message for the claimant that she was off the schedule. The claimant had been off work since June 1, 2005, because of two back surgeries. The claimant applied for an initial leave of absence to return to work on June 21, 2005, which was approved by the employer. The claimant then extended that leave of absence when she discovered that she was going to require two back surgeries and she was to return "upon doctor's release." This leave of absence extension was also approved by the employer and appears at Department Exhibit One. The claimant was released by her physician to return to work on November 6, 2005. The claimant called the lead manager, April, on October 31, 2005, and informed her that she would be released to work November 6, 2005. April told her at that time that she could start on November 7, 2005. They set up a meeting for November 1, 2005. When the claimant arrived at the meeting April told the claimant that she would probably be assigned to work Friday, Saturday, and Sunday. The claimant had been working Monday through Friday before that time. April told the claimant that she would get back to the claimant. However, April never called the claimant back. On April 6, 2005, the claimant called the employer twice as noted above and spoke to supervisors. Throughout the claimant's absences she maintained contact with Howard Penrod, the old manager who left just several weeks before the claimant was released to return to work. Pursuant to her claim for unemployment insurance benefits filed effective November 6, 2005, the claimant has received unemployment insurance benefits in the amount of $755.00 as follows: $151.00 per week for five weeks from benefit week ending November 12, 2005 to benefit week ending December 10, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 claimant credibly testified, and the administrative law judge concludes, that she was discharged. The administrative law judge further concludes that the discharge occurred on November 6, 2005, when the claimant called the employer on two occasions and was told by one of the supervisors that the manager had left a message for the claimant that she was not placed on the schedule. At that time the claimant had been released by her physician to return to work following a leave of absence approved by the employer as shown at Department Exhibit One providing for a return date upon doctor's release. Accordingly, the administrative law judge concludes that the claimant was discharged on November 6, 2005.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer failed to participate in the hearing and provide sufficient evidence of any deliberate acts or omissions on the part of the claimant

constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Further, the employer did not provide sufficient evidence of absences not for reasonable cause or personal illness and not properly reported so as to establish excessive unexcused absenteeism and disqualifying misconduct.

The claimant credibly testified that she was absent after June 1, 2005, because of two successive back surgeries and that she was released by her physician to return to work on November 6, 2005. Further, the evidence establishes that the claimant had applied for an initial leave of absence to return to work on June 21, 2005 which had been approved by the employer, and then an extension of that leave of absence for the claimant to return upon a doctor's release which was also approved by the employer as shown at Department Exhibit One. The claimant also testified that she maintained contact with the former manager, Howard Penrod. The administrative law judge concludes that these absences were for personal illness and properly reported and are not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

Apparently, the employer maintains that the claimant left her employment voluntarily. Even if the claimant's separation should be considered a voluntary quit, the administrative law judge would conclude that the claimant would still not be disqualified to receive unemployment insurance benefits. The evidence establishes that if the claimant had been allowed to return to work it would have been working Friday, Saturday, and Sunday, when the claimant had been at all other times previously employed by the employer from Monday through Friday. This change in the claimant's days of work would have been a substantial change in her contract of hire which change would have been a willful breach of her contract of hire and it would be substantial involving working hours and a quit for this reason would be with good cause attributable to the employer. See 871 IAC 24.26 (1). Further, even if the claimant would have been considered a quit because of her illnesses, it is clear that the claimant informed the employer of the need for her absences due to her illness and when she had recovered and it was certified by her physician she returned to the employer and offered to go back to work and her regular work or comparable suitable work was not available. The claimant would still be entitled to unemployment insurance benefits. See Iowa Code section 96.5-1-d. Further, the administrative law judge also notes that failure to return from a leave of absence may be considered a voluntary quit but the first leave of absence providing for her return on June 21, 2005 was extended by a second leave of absence as shown at Department Exhibit One providing for a return upon doctor's release and this was approved by the employer. Accordingly, both parties had approved the extension and therefore, the claimant did not fail to return to work at the end of a leave of absence because the leave of absence was not over until she was released to return to work on November 6, 2005 and the claimant had offered to return to work by that time. See 871 IAC 24.22 (2) (j). Accordingly, even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the

claimant quit with good cause attributable to the employer and would still not be disqualified to receive unemployment insurance benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $755.00 since separating from the employer herein on or about November 6, 2005 and filing for such benefits effective November 6, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of November 23, 2005, reference 01, is modified. The claimant, Karen L. Pavao, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant has not been overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

kkf/kjw