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

RHONDA J HOLZHAUSER
2125 INDIANOLA AVE APT 11
DES MOINES IA 50315

WALGREEN COMPANY
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-07396-RT
OC: 06/13/04 R: 02
Claimant: Respondent (1)

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, Walgreen Company, filed a timely appeal from an unemployment insurance decision dated July 1, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Rhonda J. Holzhauser. After due notice was issued, a telephone hearing was held on August 18, 2004, with the claimant participating. Meredith McEntee, Store Manager for store number 3252 in Des Moines, Iowa, participated in the hearing for the employer. The employer was represented by Susen Zevin of TALX UC eXpress. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. This matter was originally scheduled for a hearing on July 29, 2004 at 1:00 p.m., and rescheduled by the administrative law judge. An original notice of the rescheduled hearing was sent to the claimant on July 30,

2004 but returned undeliverable. It was resent on August 8, 2004 and received by the claimant. The claimant participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses 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 associate beauty advisor from June 2002 until she was discharged on June 9, 2004. The claimant was discharged for poor attendance. On June 9, 2004, the claimant was tardy over two hours because she had been ill. The claimant had a doctor's excuse for that day and previous days, but the claimant was told that the employer did not need those and the claimant was discharged. The employer has no real written policy concerning attendance but all employees are informed that they must call in and talk to management about an absence, preferably as soon as possible and before the employee's shift. The claimant was also absent on June 3, 4, 5, and 8, 2004 for personal illness. The claimant called in or had someone call in for her on at least two of those absences and on one absence, she called the employer and was told to speak to the manager and before the claimant could, she hung up. On one day, the claimant called a cell phone of the manager by mistake to inform her of the absence but could not reach her. On June 1, 2004, the claimant was tardy five and one-half hours. The claimant was actually tardy seven hours, but previously she had requested a tardy of two hours, which was approved, but the claimant did not come to work until five hours after the two-hour approved tardy. The claimant called the employer and indicated that she was not feeling well, but she was asked to come in and the claimant did so and worked for a little while. The claimant was also absent on December 13, 2003 for personal illness. Although the employer classified this as a no-call/no-show, the claimant called the employer's witness, Meredith McEntee, Store Manager for store number 3252 in Des Moines, Iowa. The claimant was not supposed to do this; she was suppose to call the store and speak to a manager. In any event, the claimant received a final written warning for her attendance including improper calling to the cell phone of Ms. McEntee. On July 24, 2003, the claimant was absent for personal illness. The claimant called but did not speak to a manager but rather to a cashier. The claimant was given a written warning and a suspension for not appropriately calling a manager. The claimant had other absences in 2003. They were due either to personal illness or for difficulties with her halfway house. The claimant was in a halfway house on probation. Frequently, the claimant had to do certain matters required of the halfway house. Sometimes she would be told to do these things at the spur of the moment. On occasions when she knew in advance, the claimant would alert the employer and get permission to be tardy or absent for these matters, but on other occasions she would have no time to do so and would be absent or tardy. The claimant did have some substantial illnesses during this period as shown at Claimant's Exhibit A.

Pursuant to her claim for unemployment insurance benefits filed effective June 13, 2004, the claimant has received unemployment insurance benefits in the amount of $1,104.00 as follows: $138.00 per week for eight weeks from benefit week ending June 19, 2004 to benefit week ending August 7, 2004.

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, (7) provide:

> 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).

> (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 parties testified that the claimant was discharged but could not agree on a date. The administrative law judge concludes that the evidence establishes that the claimant was discharged on June 9, 2004. 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. IDJS, 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. Although it is a close question, 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, namely, excessive unexcused absenteeism. At the outset, the administrative law judge notes that neither witness was particularly credible. The claimant could not remember some of her absences and maintained that she was discharged one week later than the administrative law judge so concludes. The employer's witness, Meredith McEntee, Store Manager for store number 3252, in Des Moines, Iowa, could only testify first hand to a few absences the claimant had. She was unable to provide specific information about other absences the claimant had in 2003 before Ms. McEntee became the store manager. Further, at the end of the hearing, Ms. McEntee corrected several misstatements she had made earlier. In any event, the administrative law judge concludes that the claimant did have absences and tardies as set out in the Findings of Fact. Ms. McEntee did concede that many of those absences were for personal illness and at least some were properly reported. The claimant also agreed that many of these were for personal illness and properly reported. Finally, Claimant's Exhibit A although difficult to determine exactly when the claimant was ill, indicates that the claimant did have some substantial illnesses during this period of time. Accordingly, the administrative law judge concludes that the claimant's most recent absences as testified to by Ms. McEntee were for personal illness. Ms. McEntee testified that some were properly reported, but the others were not. The claimant concedes that she failed to properly report the absence on June 8, 2004 because she mistakenly called Ms. McEntee on her cell phone rather than call the manager. The administrative law judge believes that this was a legitimate mistake and the claimant made an attempt to properly report this absence. Concerning the claimant's tardy on June 9, 2004, Ms. McEntee testified that the claimant did not notify the employer. The claimant testified that she did notify the employer prior to her shift and that she was told to come in and close the store and did so. This seems to comport with Ms. McEntee's testimony that the claimant was tardy. For the claimant's tardy on June 1, 2004, Ms. McEntee testified that claimant had approval to be tardy for two hours, but then was tardy for approximately seven hours or five unexpected hours. Ms. McEntee did testify that the claimant did call in at some time indicating that she was ill. Under the circumstances here, the administrative law judge concludes that the claimant did properly report this tardy. She did have permission in advance to move for two hours and Ms. McEntee should have understood that the claimant was delayed in her move if she did not appear promptly. The claimant was absent on December 13, 2003 and Ms. McEntee testified it was not properly reported but conceded that the claimant called her cell phone and the claimant was instructed not to do so anymore in a final written warning given to the claimant for this absence. It appears here that the claimant attempted to properly report this absence. Ms. McEntee finally testified that the claimant received a written warning on July 24, 2003 for an absence for personal illness when she called but did not speak to a manager, and for this, the claimant received a written warning and a three-day suspension instructing her to call a manager. It appears to the administrative law judge that the claimant at least attempted to report this absence and was admonished for not calling a manager. There is no evidence that the claimant was admonished or warned prior to that time to call a manager. Ms. McEntee testified that later she was told to call a manager. There was also evidence that the claimant had other absences and tardies perhaps 19 in number in 2003. The claimant conceded that she did and that some were not properly reported because she was in a halfway house and often was given spur of the moment things she had to do at the halfway house without an opportunity to call the employer. Ms. McEntee seems to confirm some of the claimant's testimony by indicating that there were times when the claimant gave the employer advance notice of things she was required to do for the halfway house and the employer attempted to accommodate them. It does appear to the administrative law judge that the claimant had some real responsibilities at the halfway house, which contributed to some of her absences and tardies.

It is a close question, but on balance, and upon the record here, the administrative law judge is constrained to conclude that the claimant's absences and tardies were for personal illness or other reasonable cause and were properly reported or attempts to properly report the absences were made by the claimant. Therefore, the administrative law judge concludes that the claimant's absences and tardies were not excessive unexcused absenteeism and not disqualifying misconduct and the claimant 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 a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). Although it is a close question, 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.

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 $1,104.00 since separating from the employer herein on or about June 9, 2004 and filing for such benefits effective June 13, 2004. 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 dated July 1, 2004, reference 01, is affirmed. The claimant, Rhonda J. Holzhauser, 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.

kjf/kjf