IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIELLE R STINSON
Claimant

HY-VEE INC
Employer

APPEAL NO. 11A-UI-07318-CT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/24/11
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Hy-Vee, Inc. filed an appeal from a representative's decision dated May 25, 2011, reference 02, which held that no disqualification would be imposed regarding Danielle Stinson's separation from employment. After due notice was issued, a hearing was held by telephone on July 1, 2011. Ms. Stinson participated personally. The employer participated by Clete Hjorth, Store Operations Manager. The employer was represented by Alice Rose Thatch of Corporate Cost Control, Inc. Exhibits One through Five were admitted on the employer's behalf.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Stinson began working for Hy-Vee, Inc. on November 1, 2010 and worked approximately 25 hours each week as a cashier. She was discharged because of her attendance.

The employer requires two hour's notice of an intended absence. Ms. Stinson called less than two hours before her shift on December 10 to report that she might be absent due to her children's illness. She did not report for work or call the employer back to confirm her intentions. She signed the written warning issued for the infraction. Ms. Stinson did not appear for work or call the employer on December 11. She signed the written warning issued for the "no-call/no-show." Ms. Stinson was scheduled to work from 3:00 until 11:00 p.m. on April 9. She did not go to work because she thought she was having labor contractions. She was at the hospital from 9:00 until 11:00 p.m. on April 9. She did not report for work or call on April 10.

Ms. Stinson was in contact with the employer on April 11 and said she had been having health issues and knew she should have called. She asked if her next scheduled day was April 14 and was told by a member of management that it was. In fact, she was scheduled to work on

April 12. She returned to work on April 14 and was discharged on April 17, 2011. Attendance was the sole reason for the separation.

Ma. Stinson filed a claim for job insurance benefits effective April 24, 2011. She has received a total of $1,105.70 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

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). An individual who was discharged because of attendance is disqualified from benefits if she was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Ms. Stinson's absence of December 10 is unexcused as it was not properly reported. Although she called to say she might be absent, she did not confirm her intentions with the employer. She did not dispute the facts as presented in the warning she received for the absence. The absences of December 11, April 9, and April 10 are unexcused as they were not properly reported. Although she sought medical care on April 9, she did so at least six hours after the start of her shift. The evidence failed to establish any justification for the failure to contact the employer when she realized she would not be able to work due to possible labor contractions.

It is true that Ms. Stinson was scheduled to work on April 12 and that she did not call or report for work. However, her failure was due to misinformation on the part of management. She was told on April 11 that her next scheduled work day was April 14. Although it was her responsibility to be aware of her schedule, it was not unreasonable for her to rely on the representation made by management. Therefore, the absence of April 12 was not an act of misconduct.

Ms. Stinson had four unexcused absences during a period of four months. They were all due to the failure to give proper notice of intended absences. It creates a hardship for the employer and other workers when an individual fails to appear for scheduled work without notice. Ms. Stinson was amply warned that not reporting absences was contrary to the employer's standards and could result in discharge. Four unreported absences during four months are sufficient to establish excessive unexcused absenteeism, which is a substantial disregard of the standards an employer has the right to expect. For the reasons stated herein, benefits are denied.

Ms. Stinson has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated May 25, 2011, reference 02, is hereby reversed. Ma. Stinson was discharged for misconduct in connection with her employment. Benefits are denied until she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Ms. Stinson will be required to repay benefits.

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Carolyn F. Coleman
Administrative Law Judge

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Decision Dated and Mailed

cfc/css