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

BRENDA K LEE
1532 – 13TH ST
DES MOINES IA 50314-1907

CENTRAL IOWA HOSPITAL CORP
C/O HUMAN RESOURCES
1313 HIGH ST STE 111
DES MOINES IA 50309-3119

Appeal Number: 06O-UI-03667-RT
OC: 01/08/06 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Brenda K. Lee, filed a timely appeal from an unemployment insurance decision dated January 30, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on April 19, 2006, with the claimant participating. Jeanette Davis was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary. The employer, Central Iowa Hospital Corporation, did not participate in the hearing. Although the employer had called in a telephone number with the name of a witness, Susan Strang, where that witness could purportedly be reached for the hearing, when the administrative law judge called that number at 1:01 p.m. he reached the voicemail for Ms. Strang. The administrative law judge left a message that he was going to proceed with the hearing and that if Ms. Strang wanted to participate in the hearing she

would need to call before the hearing was over and the record was closed. The hearing began when the record was opened at 1:04 p.m. and ended when the record was closed at 1:27 p.m. and Ms. Strang had not called during that time. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. An initial hearing had been scheduled in this matter for February 28, 2006, but the claimant did not call in a telephone number for that hearing and did not participate and therefore no hearing was held. By decision dated February 28, 2006, the administrative law judge assigned to the case at that time, issued a decision affirming the representative's decision and denying benefits to the claimant. The claimant appealed this decision to the Employment Appeal Board. By decision dated March 24, 2006, the Employment Appeal Board remanded this matter for another hearing which was scheduled and held on April 19, 2006.

At 1:28 p.m. the employer's witness, Susan Strang, called the Appeals Section. The administrative law judge spoke to Ms. Strang at 1:29 p.m. The administrative law judge explained to Ms. Strang that he had called her at 1:01 p.m. and reached her voicemail and left a voicemail message for her. Ms. Strang stated that she had received the voicemail message and had therefore called. The administrative law judge inquired as to why Ms. Strang was not available at 1:01 p.m. and Ms. Strang said she must have been on the phone with someone else. The administrative law judge is not convinced of this because the phone rang several times before the voicemail came on and if the line is busy the voicemail usually comes on immediately. Ms. Strang did concede that she had received a notice and knew the date and time of the hearing. The administrative law judge asked Ms. Strang why she had not called at 1:05 p.m. or shortly after the time for the hearing since she knew the hearing was to start at 1:00 p.m. Ms. Strang informed the administrative law judge that she was told by the Appeals Section staff to call at 1:15 p.m. This is incorrect. All Appeals staff notify callers that they must call the administrative law judge five minutes after the time for the hearing if they have not been called by the administrative law judge. In any event, Ms. Strang did not call until 1:28 p.m. well after 15 minutes after the hearing was scheduled to begin or 1:15 p.m. Ms. Strang said that she was getting her voicemail messages at that time. However, it should not have taken her 13 minutes to get her voicemail messages. The administrative law judge concludes that the following rule is applicable here.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Although this rule speaks to a situation in which a party does not call in a telephone number until after the record has been closed and the hearing completed, the administrative law judge nevertheless concludes that it is applicable here where a party is not at the number provided at the time of the hearing and then does not call until after the record has been closed and the hearing completed. For good cause shown, the administrative law judge shall reopen the record and cause further notice of hearing to be issued to all parties. However, the record shall not be reopened if the administrative law judge does not find good cause to do so. Failure to read or follow the instructions on the notice of appeal and telephone hearing shall not constitute good cause for reopening the record. The administrative law judge is constrained to conclude here that Ms. Strang has not demonstrated good cause to reopen the record and reschedule the hearing. Ms. Strang did not call until 28 minutes after the time for the hearing although she knew the date and time of the hearing from the notice which she said she received. Ms. Strang did not have good reasons for not calling sooner. The administrative law judge notes that this matter has been pending for sometime and at some point unemployment insurance hearings must be finalized. The administrative law judge informed Ms. Strang that he would treat her telephone call as a request to reopen the record and reschedule the hearing made after the record had been closed and the hearing completed. The administrative law judge concludes that the employer has not demonstrated good cause for reopening the record and rescheduling the hearing and therefore the employer's request therefore is hereby denied.

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 behavioral health partner from July 25, 2001, until she was discharged on January 13, 2006. The claimant's position became full-time in March of 2004. The claimant was discharged for excessive tardiness. The claimant did have some tardies. The claimant was tardy on October 2 and 17, 2005. The claimant would frequently come to work early to relieve older staff and would be at work even before the time for her shift was to start but that she would get busy doing other things and simply forget to punch in on the time clock. The claimant testified that she was tardy on October 25, 2005 because a doctor's appointment that she had went long. The claimant also testified that after injuring her shoulder she was transferred to another hospital which was unfamiliar to her and that she forgot to punch in on the time clock on December 25 and 30, 2005. The claimant did not specifically recall other tardies but testified that she did have other tardies. One was for car trouble and all of the others were because the claimant had come to work early, gotten busy and then forgot to punch in on the time clock. The claimant received an oral warning in October of 2005 and a written warning in November of 2005 for her tardies.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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 on January 13, 2006. In order to be disqualified to received 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. As noted in the statement of the case, the employer did not participate in the hearing. Therefore, the employer did not 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 so as to establish disqualifying misconduct. The employer also failed to provide sufficient evidence of absences and in particular tardies that were not for reasonable cause or personal illness and not properly reported.

The claimant credibly testified that she had some tardies but that most were because she came to work early to relieve older staff or to perform other functions and that she would get busy and then forget to clock in. There is no evidence to the contrary. The claimant also testified that she was tardy on October 25, 2005 when a doctor's appointment went long and was also tardy in November of 2005 for car trouble. The administrative law judge concludes that these tardies were for personal illness or reasonable cause and were properly reported the claimant would have been justified in failing to properly report the tardies. The claimant testified that she had other tardies for which she had no specific date but that they were all because she was already at work and simply forgot to punch in on the time clock. The claimant testified that in December of 2005 she was transferred to another hospital and the surroundings were unfamiliar and a couple of times she was tardy there because of the unfamiliarity of the environment and again because she forgot to punch in on the time clock. The administrative law judge does find it a bit unusual that an individual would persist in forgetting to punch in on the time clock but, in the absence of any evidence to the contrary, the administrative law judge accepts the claimant's statements. It is true that the claimant received an oral warning in October of 2005 and a written warning in November of 2005 but the administrative law judge, as noted above, finds that the claimant's tardies were for reasonable cause or personal illness and are not excessive unexcused absenteeism.

In summary, the administrative law judge concludes that the claimant's tardies were not excessive unexcused absenteeism and not disqualifying misconduct. The administrative law judge further concludes that there is no other evidence of disqualifying misconduct on the part of the claimant. 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 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). 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.

DECISION:

The representative's decision of January 30, 2006, reference 01, is reversed. The claimant, Brenda K. Lee, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

cs/pjs