

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

KELLY J BAZE
PO BOX 194
KELLERTON IA 50133

CARE INITIATIVES
c/o JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 05A-UI-03910-JTT
OC: 02/20/05 R: 03
Claimant: Respondent (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)

871 IAC 24.32(9) - Suspension or Disciplinary Layoff
Section 96.4(3) - Partial Unemployment
Section 96.3(7) - Recovery of Overpayment

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the April 5, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 3, 2005. Kelly Baze did not respond to the notice of the hearing and did not participate in the hearing. Dawn Fox of Johnson & Associates/TALX UC Express represented the employer and presented testimony through Diane Leeper, Administrator.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kelly Baze is employed by Care Initiatives as a full-time certified medical assistant. Ms. Baze commenced

her employment on May 12, 2003 and continues in that employment. Pursuant to the employer's progressive discipline policy, Diane Leeper, administrator, placed Ms. Baze on an unpaid suspension for the period of February 16-23, 2005, and again for the period of April 14-22, 2005. Both suspensions were based on excessive absenteeism.

The employer has an attendance policy that is set forth in an employee handbook. Ms. Leeper provided Ms. Baze a copy of the full attendance policy each time she counseled her regarding her absences. Under the attendance policy, employees are expected to contact the employer at least two hours prior to the scheduled start of a shift if they need to be absent. The employer has a progressive discipline policy under which employees with poor attendance receive two oral warnings and then a written warning prior to being discharged. Prior to Ms. Baze's April suspension, Ms. Leeper could not locate documentation of a written warning concerning Ms. Baze's attendance and, therefore, decided to place her on a second unpaid suspension in lieu of terminating her employment.

The absence that prompted the February 16-23 suspension occurred on February 14, 2005. On that date, Ms. Baze notified the employer after the start of her shift that a member of her family was ill and that she would be absent from work. Other absences that factored into the employer's decision to place Ms. Baze on the February suspension were as follows. During the period of January 13 through February 2, Ms. Baze was on a leave of absence due to illness. On February 3, Ms. Baze called in at 9:10 p.m. for a shift that was to start at 2:00 p.m., to advise that she was absent due to illness. Ms. Baze was then absent the following day due to the same illness. On February 8, Ms. Baze notified the employer that she would be absent due to illness, however the employer's witness was unable to provide specific information regarding when Ms. Baze notified the employer and with whom she spoke when she called. On February 11, Ms. Baze was tardy to work when she appeared at 7:52 a.m. for a shift that was to start at 6:00 a.m.

The absence that prompted the April 14-22 suspension occurred on April 11, when Ms. Baze was a "no-call, no-show" for a scheduled shift. The other absence that factored into Ms. Leeper's decision to suspend Ms. Baze occurred on April 8, when Ms. Baze notified the employer at 5:00 p.m. that she would not be appearing for a shift that was scheduled to begin at 2:00 p.m. because she was out of gas.

Aside from the two periods of suspension, Ms. Baze has continued to be employed under a full time status, i.e. at least 32 hours per week. During the period between the two suspensions, Ms. Leeper gave Ms. Baze the opportunity to work fewer shifts, in the hope that working fewer shifts would make it easier for Ms. Baze to appear for her assigned shifts and establish a track record of good attendance. However, full-time hours continued to be available to Ms. Baze.

Ms. Baze established a claim for benefits that was effective February 20, 2005. Since that time, Ms. Baze has received benefits in the total amount of \$451.00, as follows. For the benefit week that ended February 26, 2005, Ms. Baze reported no wages and received benefits of \$192.00. For the benefit week that ended March 12, 2005, Ms. Baze reported \$173.00 in wages and received benefits of \$67.00. For the benefit week that ended April 16, 2005, Ms. Baze reported no wages and received benefits of \$192.00.

REASONING AND CONCLUSIONS OF LAW:

The first issue the administrative law judge must address is whether, for each period of unpaid suspension, the evidence in the record establishes that Ms. Baze was suspended for misconduct in connection with her employment based on excessive unexcused absences.

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)(9) provide:

(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.

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Baze's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that Ms. Baze's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to suspend the Ms. Baze was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based on the evidence in the record, the administrative law judge concludes as follows. Ms. Baze's absences on February 3 and 14, as well as the tardiness on February 11, were unexcused absences. The absences on January 13-February 2, February 4 and 8 were excused absences. Ms. Baze's absences on April 8 and 11 were unexcused absences. The unexcused absences that prompted each suspension were excessive. Accordingly, for each period of suspension, the administrative law judge concludes that Ms. Baze was suspended for misconduct. Ms. Baze is disqualified for benefits during the February 16-23 suspension and the April 14-22 suspension.

An additional issue that is before the administrative is the whether Ms. Baze was partially unemployed at any point since she established her claim for benefits.

The requirement that Ms. Baze be able and available for other work in order to be eligible for unemployment insurance benefits would be waived for any benefit week during which Ms. Baze were partially unemployed. See Iowa Code section 96.4(3). A claimant is deemed to be partially unemployed during any benefit week in which they worked less than the regular full-time hours at their regular employer, because of lack of work, and earned less than their full benefit amount plus \$15. See 871 IAC 24.1(a).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Baze has not been partially unemployed since establishing her claim for benefits, effective February 20, 2005.

The last issue the administrative law judge must address is the issue of overpayment of 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.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Baze has been overpaid benefits totaling \$451.00. Ms. Baze will have to repay that amount.

DECISION:

The representative's decision dated April 5, 2005, reference 01, is reversed. During February 16-23, 2005, and April 14-22, 2005, the claimant was suspended from her employment due to misconduct. The claimant is disqualified for benefits for the benefit weeks during which she was suspended. The claimant has not been partially unemployed since

establishing her claim for benefits. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits of \$451.00.

jt/tjc