IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

DREWNETTA V PARKER
Claimant

JELD-WEN INC
Employer

APPEAL NO. 18A-UI-08695-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/03/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Jeld-Wen (employer) appealed a representative's August 7, 2018, decision (reference 07) that concluded Drewnetta Parker (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 6, 2018. The claimant participated personally. The employer participated by Megan DeJong, Customer Service Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 25, 2018, as a full-time customer service representative in training. She signed for receipt of the employer's attendance policy on June 25, 2018. The policy states, "Any associate who accumulates more than one point during the first 90 days of employment may be terminated at the manager's discretion." Employees tracked their own hours and knew when they went to break.

When she was hired the claimant understood she started work at 8:30 a.m. and the employer allowed a four minute discretionary period. On June 29, 2018, the employer telephoned the claimant while she was in her car in the parking lot at approximately 8:29 a.m. and told her she was late. The claimant talked to the customer service manager and discovered her shift started at 8:00 a.m. The customer service manager told the claimant to be on time in the future or she could be disciplined. The claimant started writing down the time she started her breaks in order to always be on time. The claimant was eight months pregnant and frequently used the restroom due to her condition. Using the restroom was not considered taking a break.

On June 29, 2018, the claimant went to the restroom when she noticed blood on the white pants she was wearing. She did not want to be embarrassed at work and knew she had to go to the emergency room. She was not thinking clearly about what to do and decided to go to her car and call the employer. When she got to her car, she saw that the employer had left her a message. Her phone was on silent while at work and she did not hear it ring. The claimant returned the call to the employer, left a message, and drove to the emergency room. The doctor gave the claimant a note excusing her from work. The employer told the claimant the note was not necessary and did not take it.

On July 3, 2018, the employer issued the claimant a written document listing her tardiness the morning of June 29, 2018, leaving without notice on June 29, 2018, and returning late from her break on July 2, 2018. A lead worker told the employer the claimant was late returning from break on July 2, 2018, but this was incorrect. The claimant recorded her break times so she would not be late again. On July 2, 2018, the claimant went to the bathroom, returned to work for some time, and then went to break. The lead work confused her leaving for the restroom with the claimant's exiting for break. The document stated that disciplinary action would be taken if the tardiness continued to be a concern.

On July 16, 2018, the customer service manager said the claimant was late returning from break based on another employee's information about when the claimant left for break. On July 16, 2018, the claimant went to the bathroom, returned to work for a period of time, and then went to break.

The claimant filed for unemployment insurance benefits with an effective date of December 3, 2017. The employer provided the name and number of Matthew Clark as the person who would participate in the fact-finding interview on August 6, 2018. Mr. Clark did not have firsthand knowledge of the events leading to the separation. The employer provided documents in lieu of personal participation in the fact finding interview. The documents did not include the circumstances of all incidents the employer contended met the definition of unexcused absences or the warnings related to the incidents.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

The employer has provided four incidents of absenteeism. On the morning of June 29, 2018, the claimant appeared to be unaware of the start time of her shift. The claimant was not tardy at the start of her shift after the employer told her the correct start time.

On June 29, 2018, the claimant left early without notification to the employer due to a medical issue. The claimant provided the employer with a doctor's excuse for her absence and the employer did not accept the excuse. The claimant's explanation for not reporting her absence prior to leaving is deemed reasonable. Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. *Roberts v. Iowa Department of Job Service*, 356 N.W.2d 218 (Iowa 1984). This absence is not misconduct because it was due to a medical issue and could not be reported before leaving work without undue embarrassment to the claimant.

The employer did not provide information about the exact length of the claimant's breaks on July 2 and 16, 2018. The witness did not see the claimant take a break on July 2, 2018. She only saw the claimant's return from break on July 16, 2018. The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because she was an eye witnesses to the events for which she was terminated. The employer was not. The employer did not provide an eye witness to the alleged tardiness.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. In this case the employer had not previously warned the claimant that she could be terminated for attendance issues. Therefore, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's August 7, 2018, decision (reference 07) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs