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

JENNIFER L KOSTER
1119 9TH AVE S
CLINTON IA 52732

DM SERVICES INC
1515 S 21ST ST
CLINTON IA 52732

Appeal Number: 05A-UI-08375-RT
OC: 07-17-05 R: 04
Claimant: Appellant (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

STATEMENT OF THE CASE:

The claimant, Jennifer L Koster, filed a timely appeal from an unemployment insurance decision dated August 5, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on August 30, 2005, with the claimant not participating. Although the claimant had called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge twice tried to call that number, at 3:03 p.m. and again at 3:04 p.m., he reached a message indicating that the subscriber was not receiving calls at that time. The number called in by the claimant was the same number contained in Iowa Workforce Development records. No voice mail was available. The administrative law judge began the hearing at 2:05 p.m. when the record was opened and ended the hearing at 3:27 p.m. when the record was closed and the claimant had not called during that time. An individual who calls in a telephone number is instructed by the appeal

section staff, that if the administrative law judge does not call the individual by five minutes after the time for the hearing, that individual should immediately call the administrative law judge. The claimant did not do so. Sheree Banks, Human Resources Administrator, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits 1 through 4 were admitted into evidence.

The claimant called and spoke to the administrative law judge at 4:18 p.m., on August 30, 2005. The administrative law judge explained that he had twice tried to call the claimant and been unable to reach her. The administrative law judge asked the claimant if she knew the hearing was at 3:00 p.m. and she answered in the affirmative. The administrative law judge then asked why she did not call at five minutes after 3:00 p.m. as instructed by the staff when she called in a telephone number. The claimant then stated that she thought the hearing was at 4:00 p.m. and looked through her papers and found the notice and noted, finally, that the hearing was at 3:00 p.m. The claimant had no explanation as to why she was not available at 3:00 p.m. The claimant's telephone must have been working because she successfully called the administrative law judge at 4:18 p.m., thinking the hearing was at 4:00 p.m. If the claimant had called at 3:18 p.m., she would have been able to participate in the hearing. The administrative law judge informed the claimant that the hearing had begun and the record was opened at 3:05 p.m., and ended when the record was closed at 3:27 p.m. and he could not now take evidence. The administrative law judge informed the claimant that he would treat her telephone call as a request to reopen the record and reschedule the hearing made after the hearing had been held and the record closed.

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 not directly in point, the administrative law judge concludes that the above rule is applicable here, although that rule applies to parties who do not respond to the notice of appeal and telephone hearing. The administrative law judge concludes that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing. It appears to the administrative law judge that the bottom line is, that the claimant forgot that the hearing was at 3:00 p.m. and believed that it was at 4:00 p.m. and therefore was not available for the hearing

at 3:00 p.m. Even assuming that her phone could not take an incoming call, the claimant could make outgoing calls and should have done so at 3:05 p.m. or shortly thereafter, and she could have participated in the hearing. Accordingly, the administrative law judge concludes, that the claimant has not demonstrated good cause for reopening the record and rescheduling the hearing and her 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, including Employer's Exhibits 1 through 4, the administrative law judge finds: The claimant was employed by the employer as a part-time credit specialist from April 14, 2004, until she was discharged on July 18, 2005, for poor attendance. The claimant averaged between 15 and 22 hours per week. The claimant's entire absences and tardy record is shown at Employer's Exhibit 2. Page 2 and 4 of the Exhibit, actually numbered page 4 and page 2, indicate the itemized absences and tardies. On July 1, 2005, the claimant was tardy seven minutes and gave no reason. On June 20, 2005, the claimant was tardy one minute and gave no reason. On June 13, 2005, the claimant left work early 4.73 hours for personal business. The claimant made up four hours of this, but was still showing leaving work early .73 hours. On June 17, 2005, the claimant was tardy ten minutes and gave no reason. The employer considers such a tardy, an absence per its policy. On June 7, 2005, the claimant was tardy two minutes and gave no reason. She also took a half a day of personal leave, which was excused by the employer. On June 3, 2003, the claimant was tardy 1/3 of an hour and gave no reason. This is considered an absence by the employer. On May 30, 2005, the claimant had an unpaid holiday and this was excused by the employer. On May 2, the claimant was tardy .24 hours without giving a reason and this is considered an absence by the employer. The claimant had many other absences and tardies, as shown at Employer's Exhibit 2. The employer's attendance policies are shown at Employer's Exhibit 1. The claimant received ten written warnings called performance notifications, all as shown at Employer's Exhibit 3. The last, on June 20, 2005, also placed the claimant on probation. The claimant was told by these written warnings that continued violations could result in further corrective action including, termination of employment.

The claimant was not discharged until July 18, 2005, because the employer generates a monthly attendance report, as shown at Employer's Exhibit 2. The employer does not discharge anyone for attendance until that monthly attendance report is generated and it is not necessarily generated at the beginning of a month. The report for the claimant was generated on July 14, 2005. The employer then verified the absences and tardies, as shown in that report, and then discharged the claimant on July 18, 2005.

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.

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 employer's witness, Sheree Banks, Human Resources Administrator, credibly testified, and the administrative law judge concludes, that the claimant was discharged on July 18, 2005. 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. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant's attendance record is replete with absences and tardies. In the last month of the claimant's employment, the claimant was tardy five times. Two of those tardies were sufficiently long, that the employer considered them absences under the employer's policy. Nevertheless, because the claimant did show up for work, the administrative law judge considered all of these tardies. During that month, the claimant also left work early 4.73 hours for personal business and only made up four hours of that leaving .73 hours. The claimant did not give any reasons for these tardies, nor did the claimant notify the employer in advance of any of these tardies. The administrative law judge is constrained to conclude that these tardies were not for reasonable cause or personal illness and not properly reported and were excessive unexcused absenteeism. The administrative law judge further notes that the

claimant received ten written warnings in slightly more than one year concerning her attendance. The written warnings appear at Employer's Exhibit 3. The written warnings informed the claimant that continued violations can subject the claimant to further corrective action, including termination. The last warning on June 20, 2005, resulted in probation. Despite all the written warnings, including the warning on June 20, 2005, establishing the probation, the claimant was tardy on July 1, 2005, seven minutes and then discharged.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

There was a lapse of time from the claimant's last tardy on July 1, 2005, and her discharge on July 18, 2005. This was explained credibly by Ms. Banks. A monthly attendance report is generated and no one is discharged until that monthly attendance report is generated. These monthly attendance reports are not generated necessarily at the end of a month. In fact, the claimant's monthly attendance report was generated on July 14, 2005, two weeks after the claimant's tardy giving rise to her discharge. Ms. Bank's then credibly testified that the absentee record, including tardies, had to be reviewed before the claimant could be discharged. Under the evidence here, the administrative law judge concludes, that the delay in the claimant's discharge does not indicate that the claimant was discharged for a past conduct. It is true that a discharge for misconduct cannot be based on past acts, but the administrative law judge concludes here, in view of this explanation, that the claimant was not discharged for past acts. See 871 IAC 24.32(8).

DECISION:

The representative's decision of August 5, 2005, reference 01, is affirmed. The claimant, Jennifer L. Koster, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism.

dj/pjs