IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ASHENA L TUCKER
Claimant

CASEY'S MARKETING CO
Employer

APPEAL NO. 13A-UI-01114-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/23/12
Claimant: Respondent (2-R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the January 22, 2013 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on March 4, 2013. Claimant participated. Employer participated through manager Chris Kisand. Employer's Exhibit One was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Is the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was hired September 3, 2010 as a cashier/pizza maker on the 4 p.m. to 11 p.m. shift and had problems with that shift because of her children's (ages 5 and 9) school issues. She had a classification change on October 19, 2012 when she asked for a morning shift and was assigned to make donuts on the 4 a.m. to 9 a.m. shift. Her mother gets off work at 7 a.m. and her brother between 2:30 a.m. to 4 a.m. They watch her children while she is at work. Their arrival at home after work determined whether or not she was tardy reporting to work. She was discharged from employment on December 28, 2012 after being absent on December 27. She called kitchen helper Virginia Williams at the store about 9 a.m. because Kisand was busy. She planned to go to work after a disagreement with Kisand the day before but did not make sure her alarm clock was set correctly. She was tardy on December 21 because she was notified at the last minute she would be a replacement for someone else's shift. She had been warned on October 8, 2012 for tardiness on September 1, 6, 7, 14, 21, and October 4, 2012. The employer warned her on August 1, 2012 for tardiness on June 18, 19, July 17, and 18, 2012. (Employer's Exhibit One)

Claimant received unemployment benefits after the separation on a claim with an effective date of December 23, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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) 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. It is unfortunate that there was not a shift that was more suitable for caring for school-aged children but claimant requested the shift change and accepted the only other shift available rather than stay with the status quo. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The administrative law judge further concludes the claimant has been overpaid benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The January 22, 2013 (reference 01) decision is reversed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs