IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LORINDA J TRITTEN
Claimant

MCKENZIE CHECK ADVANCE OF IOWA
Employer

APPEAL NO. 08A-UI-05421-CT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/21/07 R: 01
Claimant: Respondent (2)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments
Section 96.6(2) – Timeliness of Appeals
Section 96.7(2)a – Appeal from Statement of Charges

STATEMENT OF THE CASE:

McKenzie Check Advance of Iowa (McKenzie) filed an appeal from a representative's decision dated November 15, 2007, reference 01, which held that no disqualification would be imposed regarding Lorinda Tritten's separation from employment. After due notice was issued, a hearing was held by telephone on June 24, 2008. The employer participated by Carisa Driscoll, Divisional Director of Operations; Sherry Woodke, Manager; Lori Peercy, Manager; and Graden Garmon, Unemployment State Specialist with TALX Corporation. Ms. Tritten did not respond to the notice of hearing.

ISSUE:

The first issue is whether the employer filed a timely appeal from the determination allowing benefits to Ms. Tritten. If the appeal is deemed timely, the issue then becomes whether Ms. Tritten was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: The representative's decision that is the subject of this appeal was mailed to the employer at its address of record on November 15, 2007 and received by the employer on November 17. An appeal was filed by fax on November 26 but was not received by Workforce Development. The employer did not know benefits were being paid to Ms. Tritten and charged to its account until it received the statement of charges for the first calendar quarter of 2008. The statement of charges was mailed to the employer on May 9, 2008. The employer filed an appeal on June 5, 2008.

Ms. Tritten was employed by McKenzie from December 4, 2006 until October 26, 2007. She was last employed full time as manager. She was discharged for consuming alcohol on the job. At approximately 1:00 p.m. on October 25, Ms. Tritten told her coworker, Sherry Woodke, that she was going to a nearby store to get something to drink. When she returned, Ms. Woodke

noted that she had a red-capped bottle in a paper bag. Ms. Tritten proceeded to a back area and remained there for approximately three minutes. Ms. Woodke called the divisional manager, Carisa Driscoll, to report that Ms. Tritten was drinking on the job. When Ms. Woodke went to the break area, she noted a half-empty bottle of Smirnoff Ice on the table.

Ms. Driscoll and another manager, Lori Peercy, went to Ms. Tritten's work location at approximately 4:30 p.m. on October 25. The cap from the bottle of Smirnoff Ice was on the table. The empty Smirnoff Ice bottle was discovered in the garbage. Ms. Tritten denied drinking on the job. She smelled of alcohol and attributed it to having consumed alcohol the evening of October 24 and early morning hours of October 25. She complied with the employer's request that she have a breathalyzer test done. Prior to going for the test, she consumed at least two sodas and chewed gum. The testing was done at a local hospital and the results were .000. Ms. Tritten was notified of her discharge on October 26, 2007. The above matter was the sole reason for the separation.

Ms. Tritten filed a claim for job insurance benefits effective October 21, 2007. She has received a total of $1,950.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes from all of the evidence that the employer filed a timely appeal. The appeal was originally filed by the designated due date but, through no fault of the employer, it was not received by Workforce Development. An employer that has not been previously notified of an award of benefits may appeal from a quarterly statement of charges. See Iowa Code section 96.7(2)a. The employer received the statement of charges reflecting benefits paid to Ms. Tritten and filed an appeal within 30 days as required. The statement of charges was mailed on May 9, 2008 and the appeal was filed on June 5, 2008. For the reasons stated above, the administrative law judge concludes that the employer filed a timely appeal from the determination allowing benefits to Ms. Tritten. As such, the administrative law judge has jurisdiction over the separation issue.

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Tritten was discharged for drinking alcohol on the job. The administrative law judge gives more weight to Ms. Woodke's personal observations than to the breathalyzer test results. The test results may have been effected by the beverages she consumed or the gum she chewed before the test. The results may also have been effected by her physical size and the amount of time that elapsed between consumption and testing.

Ms. Woodke observed Ms. Tritten return to the workplace with the bottle she later saw in the back area. She also observed a half-empty bottle of Smirnoff Ice in the same area. Although she did not see Ms. Tritten actually drink from the bottle, the fact remains that the empty bottle was found in the garbage. The permissible inference is that Ms. Tritten consumed the contents of the bottle. If she purchased the alcohol but then disposed of it after changing her mind about consuming it at work, there would not have been a half-empty bottle of Smirnoff Ice in the area. Presumably she would have disposed of the entire contents at one time.

Drinking alcohol on the job is clearly contrary to the type of behavior an employer has the right to expect, especially from a manager. As a manager, she was expected to set the standards for those working under her. Ms. Tritten knew or should have known, without benefit of prior warnings, that her conduct was inappropriate in the workplace. After considering all of the

evidence, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. As such, benefits are denied.

Ms. Tritten has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7). A portion of the benefits received, $666.00, has already been established as an overpayment.

DECISION:

The representative's decision dated November 15, 2007, reference 01, is hereby reversed. Ms. Tritten was discharged by McKenzie for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility. Ms. Tritten has been overpaid $1,950.00 in job insurance benefits.

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Carolyn F. Coleman
Administrative Law Judge

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Decision Dated and Mailed

cfc/css