IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRITTANY A BARBER
Claimant

VON MAUR INC
Employer

APPEAL NO: 17A-UI-09318-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/13/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 30, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 28, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Brenda Lindell, Store Manager, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time sales associate in cosmetics for Von Maur from November 9, 2015 to August 15, 2017. She was discharged from employment due to a final incident of absenteeism that occurred on August 12, 2017.

The employer's attendance policy allows employees to accumulate 18 incidents of tardiness before a written warning is issued and allows employees to accumulate 25 incidents of tardiness before termination results. An employee receives a written warning after five unexcused absences and is terminated when she reaches nine unexcused absences after sick leave is exhausted. Employees start with a clean slate of absences and tardiness on the anniversary date of their hiring. Employees may clock in up to seven minutes before the start time of their shift.

On November 11, 2016, the claimant was four minutes tardy; on November 15, 2016, she was one minute tardy returning from a meal break; on November 16, 2016, she was 29 minutes tardy; on December 4, 2016, she was one minute tardy; on December 11, 2016, she was three

minutes tardy; on December 16, 2016, she was one hour and 40 minutes tardy; on January 12, 2017, she was seven minutes tardy; on January 19, 2017, she was 25 minutes tardy; on January 20 and January 22, 2017, she was four minutes tardy; on February 1, 2017, she was three minutes tardy; on February 8, 2017, she was one hour and 20 minutes tardy; on February 11, 2017, she was 28 minutes tardy; on February 14, 2017, she was one minute tardy returning from a meal break; on February 17, 2017, she was six minutes tardy; on March 2, 2017, she was two minutes tardy; on March 24, 2017, she was one minute tardy; on March 25, 2017, she was three minutes tardy returning from a meal break; on April 12, 2017, she was three minutes tardy; on April 19, 2017, she was 28 minutes tardy; on April 27, 2017, she was two minutes tardy; on June 29, 2017, she was one minute tardy; on August 11, 2017, she was three minutes tardy; and on August 12, 2017, she was four minutes tardy. The claimant was on a leave of absence from May 2 through June 28, 2017.

The claimant was warned on April 12, 2017, after accumulating 18 incidents of tardiness and was told she faced termination from employment if she reached 25 incidents of tardiness. There is no evidence that these absences were related to illness.

On August 15, 2017, the claimant called before the scheduled start time of her shift and asked Store Manager Brenda Lindell if her employment was going to be terminated if she came in for her shift. Ms. Lindell explained her employment would be terminated because her tardiness August 12, 2017, was her 25th since November 9, 2016.

The claimant has claimed and received unemployment insurance benefits in the amount of $208.00 for the one week ending August 19, 2017.
The employer personally participated in the fact-finding interview through the statements of Unemployment Insurance Consultant Joy Myers. The employer also submitted written documentation prior to the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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:
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> 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 established that the claimant was warned that further unexcused incidents of tardiness could result in termination of employment and the final incident was not excused. The final incident, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.
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> (2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.
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> (3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division

administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of Unemployment Insurance Consultant Joy Myers. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $208.00 for the one week ending August 19, 2017.

DECISION:

The August 30, 2017, reference 01, decision is reversed. The 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. The claimant has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $208.00 for the one week ending August 19, 2017.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn