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

MICHELLE L KILLEN
123 E 32ND ST
DES MOINES IA 50317

WALGREEN COMPANY
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12829-RT
OC: 10-31-04 R: 02
Claimant: Appellant (2)

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, Michelle L. Killen, filed a timely appeal from an unemployment insurance decision dated November 23, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on December 22, 2004 with the claimant participating. Laura Dickinson, District Pharmacy Supervisor, participated in the hearing for the employer, Walgreen Company. The employer was represented by Connie Hickerson of TALX UC eXpress. Employer's Exhibit 1 was admitted into evidence.

The claimant called on December 8, 2004 at 3:55 p.m. and left a message for the administrative law judge to call her. He did so at 11:45 a.m. on December 9, 2004. The claimant asked if the hearing could be held sooner. The administrative law judge explained that

he could not schedule the hearing sooner because he was already scheduled for hearings. The claimant said something to the effect that the employer may not be contesting benefits. The administrative law judge told the claimant that if the employer would call the administrative law judge and inform the judge that the employer did not intend to participate in the hearing, he might be able to have the hearing sooner. The employer did not call the administrative law judge so the hearing was held as scheduled.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time pharmacy technician from December 30, 2003 until she was discharged on September 23, 2004 for poor attendance. On September 22, 2004, the claimant was tardy 35 minutes because a shirt was not dry. She notified the employer of this tardy. The employer has a policy in its handbook, and of which the claimant was aware, that an employee who is going to be absent or tardy must call the manager and if more than one day must call each day unless hospitalized. On September 20, 2004, the claimant was tardy 10 minutes and provided no reason. Whether the claimant called in this tardy is uncertain. On September 17, 2004, the claimant was tardy 28 minutes. The claimant testified that it was because her schedule had changed. Whether the claimant notified the employer of this tardy is uncertain. On September 16, 2004, the claimant was tardy 57 minutes. The claimant had a doctor appointment and provided the employer notice. On September 15, 2004, the claimant was tardy 8 minutes and provided no reason. Whether the claimant notified the employer is not certain. The employer had no other documentation of absences and tardies. On July 12, 2004, the claimant received a final written warning as shown at Employer's Exhibit 1. However, the claimant testified that she was told that this was not really a final written warning. The claimant received verbal warnings about her attendance in April and June 2004 and another verbal warning on or about September 17, 2004. Prior to July 12, 2004, the claimant had a problem with her pregnancy and other health problems which did cause her to be absent as set out in the final written warning.

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 not.

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, (7) provide:

> 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).

> (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 parties agree, and the administrative law judge concludes, that the claimant was discharged on September 23, 2004. 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). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism and tardies. Neither witness was particularly credible. The employer's witness, Laura Dickinson, District Pharmacy Supervisor, only had documented tardies in September 2004 and had no other documented absences or tardies. She also could not state whether the claimant had or had not notified the employer in advance of her tardies. The claimant was also not particularly credible. The claimant denied any verbal warnings from Ms. Dickinson but Ms. Dickinson was credible to the extent that the administrative law judge believes that she did give the claimant some verbal warnings. The claimant also testified that the final written warning was not a final written warning although it says in its caption that it is. The administrative law judge admitted the final written warning into evidence because the claimant had signed it and was familiar with the document but the claimant had not received a copy of the final written warning. Ms. Dickinson

testified to 5 tardies in September 2004 as set out in the findings of fact. The claimant conceded to 3 tardies. The first on September 22, 2004 which triggered the claimant's discharge was because her shirt was not dry and the claimant testified that she called the employer and informed the employer that she was going to be tardy and was told that that would be alright. The second tardy was on September 17, 2004 when the claimant testified that she was not, in fact, tardy but was actually scheduled at a different time and came in on time. The third on September 16, 2004 when she had a doctor appointment and she had given the employer notice of this tardy. The claimant denied the other 2 tardies. The claimant did have previous absences and tardies giving rise to her final written warning but there is no specificity to these and even Ms. Dickinson conceded that many were for personal illness or personal reasons. Ms. Dickinson also conceded that she knew that the claimant was having a problem pregnancy. The administrative law judge must conclude because of the dearth of evidence to the contrary, that these previous absences and tardies prior to July 12, 2004, were for reasonable cause or personal illness and properly reported and are not excessive unexcused absenteeism.

Giving as much credibility to each of the witnesses as possible, the administrative law judge concludes that there were actually only two tardies that the claimant had for which she did not have explanations, September 20, 2004 and September 15, 2004. These tardies were of short duration, 10-minutes and 8-minutes respectively. The claimant testified that the time clock was off and this could account for these two tardies. The administrative law judge is also not convinced that the claimant's tardy on September 22, 2004 was for reasonable cause when she was tardy because her shirt was not dry. Even assuming that the tardies on September 15, 20 and 22, were not for reasonable cause or personal illness and not properly reported, these tardies would only account for 3 attendance violations. Generally, three unexcused absences or tardies are required to establish excessive unexcused absenteeism and disqualifying misconduct. See for example Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). At most, the claimant here had three. The administrative law judge concludes that the tardy on September 17, 2004, when the claimant's schedule was changed, and the tardy on September 16, 2004 for a doctor appointment were for reasonable cause or personal illness and properly reported and they are not excessive unexcused absenteeism. Therefore, at most, the claimant had 3 tardies. Based upon the evidence of the witnesses, the administrative law judge believes that this is slim evidence of excessive unexcused absenteeism and disqualifying misconduct.

It is true that the claimant received a final written warning on July 12, 2004, but there is no evidence that the claimant had any other absences or tardies other than those discussed above after that final written warning. The administrative law judge does conclude that the claimant received a verbal warning on September 17, 2004 and thereafter had only two tardies. The claimant had verbal warnings in April and June 2004 but these seem to be combined into the final written warning on July 12, 2004. Accordingly, although it is a close question, the administrative law judge concludes that there is not a preponderance of the evidence that claimant's absences and tardies following the final written warning were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to

warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of November 23, 2004, reference 01, is reversed. The claimant, Michelle L. Killen, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

tjc/b