IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LACEY A NELSON
Claimant

VALERO SERVICES INC
Employer

APPEAL NO: 15A-UI-02646-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/01/15
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 17, 2015, 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 April 3, 2015. The claimant participated in the hearing. Bob Abbott, Human Resources Director, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight were 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 lab technician for Valero Services from June 27, 2011 to February 5, 2015. She was discharged for excessive tardiness and failure to properly report her tardiness.

The employer has a progressive disciplinary policy. Warnings do not drop off after one year but if there have been no further issues during the year previous to the warning the employer will not necessarily "escalate" the disciplinary policy by issuing the next step of progressive discipline.

On July 10, 2013, the employer issued the claimant a verbal warning for multiple incidents of tardiness (Employer's Exhibit Three). Between June 4 and June 19, 2013, the claimant was tardy by two to seven minutes on seven occasions, including June 11, 2013, when she was one hour late (Employer's Exhibit Three). She was also and one and one-half hours tardy July 2, 2013 (Employer's Exhibit Three).

On October 2, 2013, the claimant received a written warning for tardiness after she was a few minutes late for work of a few occasions after receiving the verbal warning July 10, 2013 (Employer's Exhibit Four). Additionally, on September 26, 2013, the claimant called the

employer 20 minutes after the start time of her shift to state she would be late and was then one and one-half hours tardy (Employer's Exhibit Four). On September 29, 2013, the claimant failed to call the employer to notify it she would be late and was one hour and 45 minutes tardy (Employer's Exhibit Four). The claimant signed the warning without making comments in the box on the warning form (Employer's Exhibit Four).

On October 30, 2014, the claimant received a written warning for tardiness after she was 20 minutes tardy September 8 and October 7, 2014, and 45 minutes late October 11, 2014 (Employer's Exhibit Five). The claimant also did not call the employer to state she was going to be late October 21, 2014, until 45 minutes after the scheduled start time of her shift (Employer's Exhibit Five). The warning stated, "Any failure to comply with these and other expectations and and/or company standards will lead to further disciplinary action, up to and including termination (Employer's Exhibit Five).

After the October 30, 2014, warning, the claimant was one and one-half hours late November 3, 2014, her next scheduled shift following the October 30, 2014, warning and the employer issued her a final written warning November 13, 2014 (Employer's Exhibit Six). As a result of receiving a final written warning the claimant was required to provide the employer with a written statement indicating she was aware she had tardiness issues and what she planned to do to address those issues (Employer's Exhibit Six and Seven). The November 13, 2014, final written warning stated the claimant "could not have any further tardiness issues unless there was a legitimate reason for being late and (the claimant) called in to advise her manager she would be late" (Employer's Exhibit Six).

After the final written warning November 13, 2014, the claimant was tardy December 18, 2014 and January 28, 2015, and failed to call the employer to report she was going to be late (Employer's Exhibit Eight). Her actions on those two dates were a violation of the employer's policy and did not comply with the final written warning requirements of calling in to report any incident of tardiness (Employer's Seven and Eight). Consequently, the employer terminated her employment effective February 5, 2015 (Employer's Exhibit Eight).

The claimant testified she had health issues, including gastro esophageal reflex disease, (GERD) which often caused her to have pain and diarrhea after eating breakfast in the mornings. It was an illness with a sudden onset and she had been suffering from it since 2012 but it really became a problem by June 2014. She stated she would often call the other lab technician to notify him she would be late because her supervisor did not start work until 7:30 a.m. and the claimant started at 5:00 or 6:00 a.m. Her supervisor did provide the claimant her cell phone number to call if she was going to be late or absent and the claimant was later told to go to her work station computer and email her supervisor when she arrived at work so the employer could see the time stamp on the email.

The claimant has claimed and received unemployment insurance benefits in the amount of $2592 since her separation from this employer.

The employer did not personally participate in the fact-finding interview. It did provide written documentation which consisted of the exhibits admitted for the appeal hearing and a document in question and answer form about the claimant's warnings and separation.

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 § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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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 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.

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

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).

While the claimant does have a chronic illness which can make her ill after she eats breakfast in the mornings, and that prevented her from being on time for her job many of the days listed above, that does not eliminate her responsibility to call the employer to notify it she when she was going to be tardy for her shift. It was not unreasonable for the employer to expect the claimant to call and inform her supervisor if she was going to be late and even though her supervisor was not scheduled to start work until 7:30 a.m. and the claimant usually started at 5:00 a.m., her supervisor provided the claimant with her cell phone number so she could call her anytime. Although the claimant may have called the other lab technician, he was not a supervisor and while it was courteous for the claimant to notify him if she was going to be tardy so he could plan his day accordingly, that did not fulfill the employer's requirement that the claimant properly report her absence to the employer either through a phone call or email.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident of tardiness was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (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 non-participation, 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 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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview through written documentation within the meaning of the law. Consequently, the claimant’s overpayment of benefits cannot be waived and the claimant is overpaid benefits in the amount of $2592.

DECISION:

The February 17, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. 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 did participate in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $2592.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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