

**IN THE COURT OF APPEALS OF IOWA**

No. 0-813 / 10-0735  
Filed February 9, 2011

**HELEN COULTER,**  
Petitioner-Appellant,

**vs.**

**THE BON-TON DEPARTMENT STORES,  
INC., and IOWA WORK FORCE  
DEVELOPMENT UNEMPLOYMENT  
INSURANCE APPEALS/EMPLOYMENT  
APPEAL BOARD,**  
Respondents-Appellees.

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Appeal from the Iowa District Court for Woodbury County, James D. Scott,  
Judge.

Coulter appeals from the district court order affirming the Employment  
Appeal Board's denial of unemployment benefits. **AFFIRMED.**

Robert W. Green, Sioux City, for appellant.

Richard Autry, Iowa Employment Appeal Board, Des Moines, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

**TABOR, J.**

This case raises the question of when an administrative law judge (ALJ) is required to more fully develop the record when the person claiming unemployment benefits is without counsel at the hearing. A beauty consultant for Younkers department store sought benefits after she was fired for excessive tardiness. She contends the ALJ presiding over her hearing had a duty to inquire into the employee handbook policies in making a full and fair record. She also asserts the Employment Appeal Board (the board) should have considered this evidence on appeal. Finding the ALJ had no duty to ask about the policies contained in the handbook when neither party indicated their relevance at the administrative hearing, we affirm.

**I. Background Facts and Proceedings.**

From June 1994 until May 2009, Helen Coulter worked as a beauty consultant for Younkers, which is run by Bon-Ton Department Stores, Inc. (Bon-Ton). Bon-Ton fired Coulter after she returned to work seventeen minutes late from a lunch break. Coulter applied for unemployment benefits. On June 17, 2009, the claims section of the Iowa Workforce Development Center granted benefits after finding Bon-Ton did not furnish sufficient evidence to show misconduct.

On June 29, 2009, Bon-Ton appealed the award of benefits, alleging Coulter was discharged for excessive absenteeism and tardiness. The administrative law judge heard evidence on July 16, 2009. Jason Ehlers, an assistant store manager, appeared for Bon-Ton. Coulter appeared on her own

behalf. Neither Coulter nor Bon-Ton were represented by counsel. Before the presentation of the evidence, the ALJ advised the parties as follows:

As you participate in today's hearing please remember if either party does appeal my decision the Employment Appeal Board will not conduct another hearing like this. They won't consider any new or additional evidence or testimony unless you have good cause for not bringing it up today.

At the hearing, Ehlers testified Coulter had been given three written warnings for clocking in late; the dates of these warnings were February 27, 2008; April 3, 2008; and May 15, 2009. Coulter was terminated on the date of the final warning. In addition, Ehlers alleged Coulter also had clocked in late on October 16, 2008; October 30, 2008; January 10, 2009; and March 8, 2009. He testified she clocked in late from lunch on March 7, 2009; April 28, 2009; and May 9, 2008. Finally, Ehlers stated Coulter had been given written warnings on December 10, 2008, and December 15, 2008, for unauthorized overtime, which he defined as the unapproved adding of hours by clocking in early or clocking out late. He testified that Coulter signed a form indicating her receipt of a copy of the employer handbook.

Coulter testified she was terminated on May 19, not May 15, 2009. She testified her supervisor told her that it was better to clock in late than early and she had been given permission to attend church services over her lunch break on Saturdays. She testified that she was returning to work late from a church service when she was fired. Coulter also testified that Younkers did not uniformly enforce its tardiness policy, noting that other employees had clocked in late more frequently than she had, but had not received as many warnings. She did not

recall the dates on which she had received warnings but believed she had not been disciplined as many times as Ehlers alleged. She presented no additional evidence and made no further arguments regarding her termination at the hearing.

The ALJ issued a decision on July 17, 2009, finding Coulter's tardiness was excessive, unexcused absenteeism as set forth in section 871-24.32(7) of the Iowa Administrative Code. The ALJ reversed the grant of unemployment benefits and remanded the issue of overpayment for determination.

Coulter appealed the ALJ's decision to the board, arguing again that she had approval to attend church. She also attached a copy of the employee handbook, which lists three to six tardies in a twelve month period as "good" and stated twelve tardies in one year would result in termination.<sup>1</sup> Coulter alleged her tardies put her in the "good" category and should not have resulted in her termination.

On September 15, 2009, the board affirmed the ALJ's denial of unemployment benefits. In its decision, the board stated:

A portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that admission of additional evidence is not warranted in reaching today's decision.

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<sup>1</sup> The handbook also stated: "The Company is free to skip any step when, due to the nature or seriousness of the infraction, more severe discipline, up to and including termination, is warranted."

On October 5, 2009, Coulter applied for rehearing, arguing her termination did not conform to the policies set forth in the employee handbook. The board denied the application on October 12, 2009, finding the information submitted with the brief and her argument did not vary from that raised in her original appeal. The board concluded, “Good cause was not shown why this evidence was not submitted at the time of hearing.” The board declined to consider the evidence. Finding its earlier decision was supported by the record, the board denied rehearing.

On November 12, 2009, Coulter filed a petition for judicial review, alleging the agency erroneously interpreted the law, made fact-findings not supported by substantial evidence, and failed to consider a relevant and important matter. On March 30, 2010, the district court entered its ruling affirming the Employment Appeal Board. On April 29, 2010, Coulter filed her notice of appeal.

## **II. Scope and Standard of Review.**

The provisions of Iowa Code section 17A.19(10) (2009) control judicial review of an agency decision. Our review of the district court’s decision upholding the board’s action is limited to deciding whether that court correctly applied the law in exercising its own review function under section 17A.19. See *IBP, Inc., v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). We must apply the standards set forth in section 17A.19(10) and determine whether our application of those standards produces the same results as reached by the district court. *City of Des Moines v. Emp’t Appeal Bd.*, 722 N.W.2d 183, 189 (Iowa 2006). The district court may reverse or modify an agency’s decision only if it is incorrect

under a ground specified in section 17A.19(10), and a party's substantial rights have been prejudiced. *Id.*

### **III. Analysis.**

On appeal, Coulter contends the employee handbook should have been considered in determining whether she was fired for cause. She argues the ALJ should have asked the employer about the contents of the handbook. She further argues the Employment Appeal Board should have considered the handbook in deciding the appeal. Coulter claims the handbook sets out substantially different criteria for employee tardiness and absenteeism and, had the employer's conduct been measured by those criteria, the evidence would show insufficient cause for her firing.

Coulter relies heavily on *Baker v. Employment Appeal Board*, 551 N.W.2d 646 (Iowa Ct. App. 1996), in arguing the ALJ should have sought out the employee handbook to include in the record. In *Baker*, this court stated an ALJ in an administrative proceeding "has a duty to develop the record fully and fairly, particularly when the claimant is not represented by counsel" and held that a claimant's lack of counsel "enhance[s] the administrative law judge's duty to bring out the relevant facts." *Baker*, 551 N.W.2d at 648. Coulter claims that because she was representing herself, the ALJ should have inquired as to the contents of the employee handbook, even though she did not present it as evidence.

Like the district court, we find that the *Baker* facts differ substantially from the case before us. In *Baker*, the parties disputed whether the claimant had been offered a leave of absence from employment. *Id.* at 647. The pro se

claimant informed the ALJ about a letter she had received from a supervisor describing the circumstances surrounding her separation from employment. *Id.* But she did not introduce the letter into evidence. *Id.* When the claimant requested the Employment Appeal Board consider the letter as well as other evidence on appeal, the board denied her request finding she had not shown good cause as to why the evidence was not presented at hearing and the district court affirmed. *Id.* at 648. This court reversed and remanded the case for further proceedings, holding:

We find the administrative law judge was under a heightened duty to develop the record since Baker was unrepresented in this case. This duty required the administrative law judge to inquire about and consider the letter from Baker's supervisor concerning the circumstances of her separation from employment. The letter is alleged to be very relevant to the issues before the administrative law judge. While we make no findings regarding the letter, we find it was error for the administrative law judge to fail to inquire about the letter and to fail to at least consider it in reaching his decision when it was brought to his attention by Baker.

*Id.* at 648-49.

In contrast, during the administrative hearing in this case, Coulter offered no argument regarding the employee handbook policies and how they related to her termination. The claimant gave the ALJ no indication that the policies regarding tardiness and absenteeism were relevant to its decision. The only arguments Coulter advanced were that she had permission to return late from lunch and that other employees had not been disciplined despite more egregious conduct.

The ALJ did ask the employer whether the company had a handbook or policy manual. The employer responded that the company provided such a

handbook to Coulter. Coulter acknowledged receiving a handbook in April 2007, but did not assert that its contents were relevant to the basis for her firing. This exchange did not create a duty on the part of the ALJ to more fully develop the evidentiary record. The rationale for this court's determination in *Baker* is not present here. The ALJ had no duty to fish for evidence or to assume an adversarial role because Coulter was not represented by counsel. Coulter had ample opportunity to introduce evidence at the hearing and to raise arguments. She failed to highlight the alleged significance of the tardiness policies in the employee handbook for the ALJ and has not shown good cause for her failure.

Coulter does not argue in this appeal that the employer showed insufficient cause for terminating her employment on the record considered by the agency. Her only argument is that the agency failed to consider the employee handbook. Because we find no error, we affirm the agency decision denying Coulter unemployment benefits. But even if the ALJ and the board had considered the tardiness policies in the employee handbook, the record contained substantial evidence to support the board's decision. Coulter received warnings for unauthorized overtime, as well as for clocking in late. Her disregard of the schedule set by the employer was misconduct disqualifying her from receiving benefits.

**AFFIRMED.**