

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

DARLA A MORAN
2718 – 5½ AVE
ROCK ISLAND IL 61201

APAC CUSTOMER SERVICES OF IOWA
LLC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 06A-UI-05941-JTT
OC: 05/07/06 R: 04
Claimant: Respondent (1)

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
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

APAC Customer Services of Iowa filed a timely appeal from the May 26, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 27, 2006. Claimant Darla Moran participated. Benefits Administrator Turkessa Hill represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Darla Moran was employed by APAC Customer Services of Iowa as a full-time telephone customer service representative from January 24, 2005 until May 10, 2006, when Operations Manager Angie Johnson and Team Leader April Voyt discharged her for attendance.

The final absences that prompted the discharge occurred on May 4-5, 2006. On May 4, Ms. Moran was scheduled to work 7:00 a.m. to 4:30 p.m., but was absent due to laryngitis and bronchitis. The employer's attendance policy required Ms. Moran to notify the employer by the scheduled start of the shift. At approximately 4:30 a.m., Ms. Moran began her attempts to contact the employer's attendance hotline, but was not able to get through. At 7:45 a.m., Ms. Moran contacted Operations Manager Angie Johnson and told her she was ill, could not speak and would be absent. On May 5, 2006, Ms. Moran was again scheduled to work 7:00 a.m. to 4:30 p.m., but was absent due to illness. At 7:00 a.m., Ms. Moran left a message on Angie Johnson's voice mail. Ms. Johnson returned Ms. Moran's call later that morning. At that time, Ms. Moran told Ms. Johnson that she would be scheduling an appointment with her doctor and would not be returning to work until the doctor indicated she was released. Ms. Johnson told Ms. Moran to be certain to bring medical documentation when she returned to work. Ms. Moran contacted her doctor and the doctor indicated that he would attempt to work Ms. Moran into his schedule on Monday May 8. On May 6, Ms. Moran was scheduled to work 8:00 a.m. to 4:00 a.m., but was again absent due to illness. Ms. Moran did not contact APAC on that date. Though the employer's attendance policy stated that Ms. Moran was required to call in each day of an absence, Ms. Moran understood from her conversation with Ms. Johnson on May 5 that she need not make the daily phone call. The employer recorded the absence as a "no-call/no-show." Ms. Moran was not scheduled to work on Sunday, May 7 or Monday, May 8. On May 8, Ms. Moran's doctor was unable to see her and directed her to the emergency room. Ms. Moran went to the emergency room and was diagnosed with acute bronchitis. The emergency room doctor indicated that Ms. Moran would be released to return to work on May 10 and provided an excuse for May 8-10. Though Ms. Moran told the emergency room doctor about her absences on May 4-6, the doctor did not write the note for those dates because they occurred prior to the date of the emergency room visit. Later, on May 8, Ms. Moran notified Angie Johnson of her emergency room visit and indicated she would return on May 10. Ms. Moran was scheduled to work on May 9, was absent due to illness, and did not contact the employer. Ms. Moran returned to work on May 10 and presented the employer with the doctor's note for May 8-10. At the end of her shift, Ms. Moran was summoned to a meeting and discharged for attendance and "lack of communication."

Ms. Moran had received three prior warnings for attendance, but all three were prompted by absences due to illness properly reported to the employer.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Moran was discharged for misconduct in connection with the employment. It does 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 provides:

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Ms. Moran's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness

is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The administrative law judge notes that the employer failed to present testimony from Operations Manager Angie Johnson, Team Leader April Voyt, or Ms. Moran's immediate supervisor, all of whom continue to be employed by APAC. The greater weight of the evidence in the record indicates that Ms. Moran's absences on May 4-9 were all excused absences. The evidence indicates that Ms. Moran took appropriate steps to notify the employer of her absences due to illness and deviated from the daily call in procedure only after reaching an understanding with Operations Manager Angie Voyt that she did not need to make the daily call.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Moran was discharged for no disqualifying reason. Accordingly, Ms. Moran is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Moran.

DECISION:

The Agency representative's decision dated May 26, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kkf