

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY S GOERING
Claimant

APPEAL NO. 08A-UI-07718-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AMERICAN ENTERPRISE SERVICES
COMPANY**
Employer

**OC: 07/13/08 R: 02
Claimant: Appellant (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Wendy Goering filed a timely appeal from the August 27, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 9, 2008. Ms. Goering participated. Emily Stevens, Human Resources Business Partner, represented the employer and presented additional evidence through Gary Williams, Agent Support Supervisor. Exhibits Two and Three were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Wendy Goering was employed by American Enterprise Services on a full-time basis from July 17, 2006 until July 11, 2008, when Gary Williams, Agent Support Supervisor, discharged her for tardiness. Ms. Goering had joined Mr. Williams' work area in June or July 2007 and worked as a sales support representative. Ms. Goering's regular work hours were 8:30 a.m. to 5:00 p.m., Monday through Friday. The employer had a tardiness policy, whereby the employer did not document an incident of tardiness or take disciplinary action unless the employee was at least eight minutes late. Ms. Goering was familiar with the policy. The employer also had an absence notification policy that required advance notice of the absence, but did not specify the amount of advance notice required.

The final incident of tardiness occurred on July 10, 2008, when Ms. Goering clocked in at 8:38 a.m. On the previous day, July 9, Ms. Goering had entered the workplace at 8:39 a.m. and clocked in shortly thereafter. Ms. Goering was late on July 9 because she had been stopped by a peace officer and issued a citation for a defective tail light.

The employer considered prior attendance matters in making the decision to discharge Ms. Goering. On February 6, 2008, Ms. Goering was 15 minutes late due to winter road

conditions. On February 15, Ms. Goering was nine minutes late for personal reasons. On February 26, Ms. Goering arrived at work at 10:29 a.m. because she had needed to attend a school conference regarding her nine-year-old daughter. This absence had previously been approved by Julie Wearmouth, Floor Supervisor. On March 3, Ms. Goering clocked in at 9:02 a.m. On that date, Ms. Goering was late due to winter road conditions that had caused another car to flip on the interstate. Ms. Goering notified Ms. Wearmouth that she would be delayed. On March 17, Ms. Goering was absent because her daughter was ill. Ms. Goering notified the employer at 7:00 a.m. On March 27, Ms. Goering was 11 minutes late due to personal reasons. On April 21, Ms. Goering clocked in at 9:42 a.m. Ms. Goering had awakened ill and left a voicemail for the employer at 7:00 a.m., indicating that she needed to see a doctor. Ms. Goering reported for work after the doctor appointment. On May 29, Ms. Goering was ten minutes late for work for personal reasons. On June 4, Ms. Goering was eight minutes late. On June 17, Ms. Goering was eight minutes for personal reasons. On June 18, Ms. Goering was 19 minutes late for personal reasons.

In making the decision to discharge Ms. Goering, the employer considered prior reprimands for attendance. An April 23, 2008 reprimand was based in part on tardiness. On June 27, Mr. Williams issued a reprimand based primarily on tardiness. In the reprimand, Mr. Williams indicated that if Ms. Goering had another attendance issue before August 26, 2008, she would be discharged.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 greater weight of the evidence establishes unexcused tardiness on July 9 and 10, 2008. The greater weight of the evidence establishes additional incidents of unexcused tardiness on February 15, March 27, May 29, June 4, June 17 and June 18. The greater weight of the evidence indicates that the rest of the absences or incidents of tardiness should be deemed excused absences under the applicable law. The incidents of unexcused tardiness occurred in the context of repeated warnings regarding attendance. The final two incident of tardiness occurred after the employer had specifically warned Ms. Goering that she faced discharge if there were additional attendance issues. Ms. Goering testified that she knowing pushed the limit of the employer's tardiness policy and the other evidence in the record corroborates that testimony. The evidence establishes excessive unexcused tardiness.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Goering was discharged for misconduct. Accordingly, Ms. Goering is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Ms. Goering.

DECISION:

The Agency representative's August 27, 2008, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit

allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css