

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMILY C BEAL
Claimant

APPEAL NO. 08A-UI-05190-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STRATEGIC FINANCIAL SOLUTIONS LLC
Employer

OC: 04/27/08 R: 03
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Strategic Financial Solutions filed a timely appeal from the May 23, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 26, 2008. Claimant Emily Beal participated. Larry Witzel, President, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the Iowa Judicial Branch records concerning Marshall County Case Number FECR070868, which records are located at www.iowacourts.state.ia.us. Exhibit One was received into evidence.

This matter was originally set for hearing on June 16, 2008 and notice was mailed to the parties on June 3, 2008. The employer responded to the notice and provided the name of a representative and a number at which the representative could be reached: Linda Kappler at 319-363-2509. Claimant Emily Beal did not respond to the hearing notice. At the time set for the June 16 hearing, neither party appeared. The administrative law judge's call to the employer was routed to The Principal in Des Moines. The employer was unavailable for the June 16 hearing due to the flooding of its office in Cedar Rapids. The administrative law judge rescheduled the hearing to June 26, 2008, to give the parties a second opportunity to prepare for and participate in the appeal hearing. The hearing notice was mailed to the parties on June 17, 2008.

ISSUE:

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

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Emily Beal was employed by Strategic Financial Solutions as a part-time administrative assistant from February 4, 2008 until April 15, 2008, when Larry Witzel, President, and Linda Kappler, Office

Manager, discharged her from the employment. Ms. Beal's regular work hours were 8:45 a.m. to 2:45 p.m., Monday through Friday. Ms. Kappler functioned as Ms. Beal's immediate supervisor.

On Saturday, April 12, 2008, Ms. Beal was arrested in Marshall County and charged with Second Offense Operating While Intoxicated, Possession of a Controlled Substance, and three counts of Child Endangerment Not Causing Injury. The Controlled Substance charge is a serious misdemeanor. The other charges are aggravated misdemeanors. Ms. Beal was held in jail overnight and released to the supervision of the Department of Correctional Services the next morning. The court directed Ms. Beal to contact a substance abuse treatment agency, SATUCI. Ms. Beal did not contact SATUCI, but entered an inpatient substance abuse/alcohol treatment facility in Waterloo.

Ms. Beal had her mother leave a voice mail message for Ms. Kappler on Sunday, April 13, 2008. In the message, Ms. Beal's mother said that Ms. Beal would have to enter a hospital/treatment facility. Ms. Beal's mother left a return phone number.

On Monday, April 14, Ms. Beal did not appear for her scheduled shift. When Ms. Beal did not appear for her shift on Tuesday, April 15, Ms. Kappler telephoned Ms. Beal's mother. Ms. Beal's mother indicated that Ms. Beal was in the hospital and made an additional reference to having to pick up Ms. Beal's car. Ms. Beal's mother was unwilling to provide the employer with additional details concerning Ms. Beal's circumstances and told Ms. Kappler that she would need to speak directly with Ms. Beal. Ms. Kappler attempted to reach Ms. Beal at her cell phone number, but was unable to make contact with Ms. Beal.

Ms. Kappler used the Internet to access the Iowa Judicial Branch's website at www.iowacourts.state.ia.us. Ms. Kappler saw that Ms. Beal had been arrested and charged with the four counts referenced above. The employer erroneously concluded that Ms. Beal had been charged with a felony offense.

Ms. Beal's mother notified Ms. Beal that the employer had called for more information. Ms. Beal used a toll free number to leave a voice mail message for Ms. Kappler. In the message, Ms. Beal said that she was in the hospital, would be in a treatment center for two weeks, and would contact the employer when she could.

On Wednesday, April 16, Ms. Kappler was able to speak with Ms. Beal. Ms. Beal indicated that she would be in the treatment facility for two weeks. Ms. Beal provided information about how she came to be charged with the criminal offenses. Ms. Beal indicated that she had operated her vehicle after consuming alcohol, but had not been in her vehicle when law enforcement was summoned. Ms. Beal indicated that the child endangerment charges were brought because the children were not in their car seats. Ms. Beal denied that the controlled substance located in the vehicle was hers. Ms. Kappler told Ms. Beal the employer was ending her employment. Ms. Beal indicated that she anticipated that she would lose her job as a result of the pending criminal charges and due to the nature of the employer's financial services business.

The employer has an operating procedures guide that discusses the importance of preserving the employer's relationship with its clients. The operating procedures guide addresses the need for employees to demonstrate trustworthiness and integrity, and the need for employees to operate within the confines of the law. Ms. Beal received a copy of the operating procedures guide. The employer did not have copy of the relevant provision(s) available for the hearing. Though the employer's hardcopy records are currently secured located off-site in a secured facility due to the flood, the employer is able to access the procedures manual via computer.

Ms. Beal established a claim for unemployment insurance benefits that was effective April 27, 2008 and has received benefits totaling \$2,656.00.

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).

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).

The evidence identifies two primary bases for employer's decision to discharge Ms. Beal from the employment. The first basis was Ms. Beal's arrest and the criminal charges brought against her for off-duty conduct. The second basis was Ms. Beal's failure to appear for work for two consecutive days. The administrative law judge will first address the off-duty conduct.

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Court found misconduct. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

The evidence in the record indicates that at the time of the discharge, Ms. Beal had been charged with four indictable offenses, three of which were aggravated misdemeanors and one of which was a serious misdemeanor. The evidence indicates that at the time of the discharge, Ms. Beal had not been convicted of any of the charges. An arrest and/or criminal charge is a mere allegation of criminal conduct. An arrest and/or charge is not proof of guilt beyond a reasonable doubt or proof of guilt by even a preponderance of the evidence. In the present case, the employer erroneously concluded that Ms. Beal had been charged with a felony offense. More importantly, the employer erroneously treated the criminal charges as equivalent to a conviction. While it was within the discretion of the employer to decide it did not wish to continue Ms. Beal's employment, the evidence in the record fails to establish off-duty misconduct.

Even if the evidence did establish off-duty misconduct, the evidence in the record is insufficient to establish that the employer had a work rule that addressed Ms. Beal's off-duty conduct. While the administrative law judge appreciates the impact of the extensive flooding of 2008, the evidence indicates that the flood did not prevent the employer from accessing its operating procedures manual via computer. The employer had the ability to provide a copy of the relevant provisions and/or the ability to read the provisions into the record at the time of the hearing, but failed to make the material available.

The administrative law judge will next turn to the issue of Ms. Beal's attendance.

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 evidence indicates that Ms. Beal's absences on April 14 and 15 were directly related to her arrest on April 12 and the criminal charges that had been brought against her. While the off-duty conduct did not constitute misconduct in connection with the employment, the evidence indicates that Ms. Beal's absences on April 14 and 15 were unexcused absences under the applicable law. The court records indicate that before Ms. Beal was released from custody on April 13, she went before a judge for an Initial Appearance. At the time of the Initial Appearance, the judge would have notified Ms. Beal that she faced the possibility of a prison

sentence not to exceed two years for each of the four aggravated misdemeanor charges and jail not to exceed 180 days or one year for the Controlled Substance charge. The greater weight of the evidence indicates that Ms. Beal voluntarily entered a substance abuse treatment facility as a direct response to the criminal charges. Ms. Beal had only been in the employment for two months. Ms. Beal was absent for two consecutive days, but also notified the employer she would not be at work for the next two weeks. Under the circumstances, the administrative law judge concludes that Ms. Beal's unexcused absences were excessive and constituted misconduct that disqualifies Ms. Beal for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Beal was discharged for misconduct. Accordingly, Ms. Beal 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. Beal.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Beal has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Beal must repay to Iowa Workforce Development. Ms. Beal is overpaid \$2,656.00.

DECISION:

The Agency representative's May 23, 2008, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been 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/pjs