

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAMIQUE A HAYNES

Claimant

APPEAL NO. 09A-UI-05500-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS DIRECT TELEMARKETING INC

Employer

**Original Claim: 03/01/09
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 26, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 5, 2009. Claimant Shamique Haynes participated. Nichole Hrabak, Human Resources Recruiter, represented the employer. Exhibits 1 through 17 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: Shamique Haynes was employed by Access Direct Telemarketing as a full-time customer service representative/telemarketing sales representative from April 30, 2007 until February 25, 2009, when Brad Mears, Program Manager, discharged her for attendance. The separation/termination form is dated February 25 and contained signatures dated February 25. Ms. Haynes immediate supervisor was Sarah Clark, Team Manager. Mr. Mears and Ms. Clark are still with the employer. Ms. Haynes' regular hours of employment were 8:00 a.m. to 2:00 p.m., Monday through Friday.

The final absence that prompted the discharge occurred on February 24, 2009, when Ms. Haynes left work at 2:48 p.m. after arriving for work at 1:46 p.m. Ms. Haynes was ill. Ms. Haynes arrived at work late in her shift because she was ill and not feeling well. When Ms. Haynes arrived for work that day, she did so with the intention of making up the time she had missed earlier in the day. The employer's established practice was to allow employees to make up missed time. The employer required employees to make up missed time prior to the end of the pay period.

While Ms. Haynes was at the workplace on February 24, Mr. Mears and Ms. Clark summoned her to a conference to discuss her attendance and to issue a reprimand or "occurrence" for prior absences. Mr. Mears warned Ms. Haynes that subsequent absences would result in

disciplinary action up to discharge from the employment. Ms. Haynes told Mr. Mears and Ms. Clark that she was not feeling well. Ms. Haynes left work shortly after the meeting because she was ill. Ms. Haynes spoke with Ms. Clark prior to leaving work. Ms. Clark gave no indication that this departure due to illness was unauthorized. Ms. Haynes' 2:48 p.m. departure was after what would otherwise have been the 2:00 p.m. scheduled end of her shift.

When Ms. Haynes appeared for work on February 25, Mr. Mears summoned to a conference and discharged her from the employment. It was Ms. Haynes' departure the previous afternoon that triggered the discharge.

Ms. Haynes had received reprimands or "occurrence" for prior absences under the employer's no-fault attendance policy.

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 administrative law judge notes that the employer presented no testimony from persons who had firsthand information about the events that led to Ms. Haynes' discharge. The administrative law judge concludes that the employer had the ability to present more direct and satisfactory evidence.

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 weight of the evidence indicates that the final absence that triggered the discharge was for illness and was properly reported to the employer. Because the final absence was an excused absence under the applicable law, the administrative law judge need not further consider the prior attendance matters that factored into the discharge.

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

DECISION:

The Agency representative's March 26, 2009, reference 01, decision 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw