

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RHONDA H DOWNEY**  
Claimant

**APPEAL NO. 07A-UI-05875-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STAFFCO OUTSOURCE MANAGEMENT**  
Employer

**OC: 05/13/07 R: 04**  
**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:**

Staffco Outsource Management filed a timely appeal from the June 1, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 28, 2007. Claimant Rhonda Downey participated. Lynette Simmons, Plant Manager, represented the employer and presented additional testimony through Sherry Hocking, First Shift Supervisor. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One through Five into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her 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: Rhonda Downey was employed by Staffco Outsource Management as a full-time first-shift production operator from December 2, 2006 until April 27, 2007, when the employer's human resources department discharged her for attendance. Ms. Downey's regular hours were 7:00 a.m. to 3:00 p.m., Monday through Friday. Ms. Downey's immediate supervisor was Sherry Hocking, First Shift Supervisor. The employer provides hoses for Goodyear and adapts its production to meet the needs of Goodyear. Ms. Downey generally worked on the fuel line, but the employer moved Ms. Downey to other production lines as needed. Ms. Downey did not like working on the "twin" line. The employer believed there was pattern of early departures from work on days the employer moved Ms. Downey from the fuel line to the twin line.

The final absence that prompted the discharge occurred on April 26, 2007, when Ms. Downey left work early because she did not want to work on the twin line. Ms. Downey spoke to First Shift Supervisor Sherry Hocking about her desire to leave early. Ms. Hocking stressed to Ms. Downey that Ms. Downey was on her last attendance "point" and risked being discharged if

she left work early. Ms. Downey indicated that if she had to work on the twin line, she was just going to go home. Ms. Downey was discharged when she appeared for work the next day.

The employer considered other absences in making the decision to discharge Ms. Downey. On December 12, Ms. Downey left work early rather than work in the "G7" production line. On February 1, Ms. Downey was absent due to illness properly reported to the employer. The employer did not consider the February 1 absence in making the decision to discharge. On February 5, Ms. Downey left work early rather than work on the twin line. On February 5, the employer issued a warning to Ms. Downey for accrued attendance points. On March 8 and 9, Ms. Downey left work early due to an allergic reaction to bleach. Ms. Downey provided the employer with a doctor's excuse that excused her from work on March 8 and 9. On March 28, Ms. Downey left work early rather than work on the G6 production line. On April 19, Ms. Downey left work early rather than work on the twin line.

Ms. Downey established a claim for benefits that was effective May 13, 2007 and has received benefits totaling \$1,351.00.

### **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).

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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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 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 indicates that Ms. Downey left work early on April 26, 2007 because she did not want to perform the work assigned. The greater weight of the evidence indicates that Ms. Downey left work early on five occasions between December 12 and April 26 because she did not want to perform the work assigned. Those dates were December 12, February 5, March 28, April 19 and April 26. The greater weight of the evidence does not support Ms. Downey's assertion that she left work early due to illness on those dates. The administrative law judge was confronted with two distinct versions of events and finds the employer's testimony more credible. The employer's testimony was based on, and generally supported by, documentation the employer prepared at the time of the absences. Ms. Downey's testimony was lacking in significant detail regarding most of the absences. Ms. Downey's unexcused absences were excessive.

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

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. Downey received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Downey must repay to Iowa Workforce Development. Ms. Downey is overpaid \$1,351.00.

**DECISION:**

The claims representative's June 1, 2007, 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. The claimant is overpaid \$1,351.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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