

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH J SMULL
Claimant

APPEAL NO. 12A-UI-04928-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

OC: 03/11/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 19, 2012, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 21, 2012. Claimant Sarah Smull participated. Marcus Griffin, recruiter, represented the employer. Exhibit One was 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: The employer is a temporary employment agency. Sarah Smull commenced getting work through Aerotek, Inc. in October 2011 and performed work in a full-time, temporary assignment at Wells Fargo Home Mortgage. Ms. Smull's work hours were 9:30 a.m. to 6:00 p.m., Monday through Friday. Ms. Smull's immediate supervisor in the assignment was Stacey Bryan. Wells Fargo ended the assignment on March 16, 2012 for attendance. The established work rules required that Ms. Smull notify both Wells Fargo and Aerotek prior the scheduled start of the shift if she needed to be absent from work. Ms. Smull was aware of the requirements. Wells Fargo's written policy actually directed Ms. Smull to contact her "agency," Aerotek, so that Aerotek could contact Wells Fargo. Ms. Smull got a copy of the written policy, and signed her acknowledgment of the policy, immediately before she started the assignment.

Ms. Smull was absent from the assignment on March 12, 13, 14, and 15, 2012. The absences on these days were due to illness. Ms. Smull properly reported the absences to Wells Fargo Bank by calling the designated number and speaking with a person at Wells Fargo Bank. But, Ms. Smull did not properly notify Aerotek of her absences on these days. On March 16, Aerotek notified Ms. Smull that Wells Fargo had ended the assignment for attendance. On March 19, Ms. Smull applied for additional work through Aerotek, but the company did not have any additional work for her at that time.

Ms. Smull had prior absences that Wells Fargo took into consideration when it ended the assignment. On October 11, 2011, Ms. Smull asked the Wells Fargo Bank supervisor if she could leave early on October 14. Ms. Smull needed the time for personal business. The Wells Fargo Bank supervisor told Ms. Smull that the time off would count against her attendance. On October 24 and 27 and November 10, 14, 15, and 16, Ms. Smull was absent due to illness and properly notified Wells Fargo and Aerotek prior to the scheduled start of her shift.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes four consecutive unexcused absences on March 12, 13, 14, and 15, 2012. On those days, Ms. Smull properly reported to Wells Fargo Home Mortgage, the client business, that she would be absent due to illness. However, Ms. Smull did not properly notify her employer, Aerotek, on any of those days that she would be absent. The weight of the evidence indicates that Ms. Smull was physically able to make the required contact with Aerotek and that she was aware that such contact was expected. If Ms. Smull was able to make the calls to Wells Fargo, there is no reason to believe she was unable to provide the exact same notice to her actual employer, Aerotek. The evidence establishes one additional unexcused absence on October 14, 2011, when Ms. Smull took time from the new work assignment for personal business. The additional absences in October and November were due to illness properly reported to both companies and were excused absences under the applicable law.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the

prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's April 19, 2012, reference 02, decision is reversed. The claimant was discharged for misconduct on March 16, 2012. 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.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw