

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NANCY E PAULUS**

Claimant

**APPEAL NO. 07A-UI-03659-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TEAM STAFFING SOLUTIONS INC**

Employer

**OC: 08/27/06 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:**

Team Staffing filed a timely appeal from the March 28, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 24, 2007. Claimant Nancy Paulus participated. Sara Fiedler, Administrative Assistant, represented the employer and presented additional testimony from Mary Kirchner, Account Executive. The administrative law judge took official notice of the Agency's administrative file generated in connection with the fact-finding interview and took official notice of the Agency's record of benefits disbursed to the claimant.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment 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: Nancy Paulus commenced her employment relationship with Team Staffing Solutions temporary employment agency on November 20, 2006 and was placed in a full-time, "temp-to-hire" assignment at Raymond Corporation in Muscatine. At the time Ms. Paulus commenced her employment with Team Staffing Solutions, the employment agency provided Ms. Paulus with written work rules that contained the employer's attendance policy. The policy required Ms. Paulus to contact Team Staffing Solutions "immediately" if she needed to be absent from or late to her assignment. The policy notified Ms. Paulus that Team Staffing Solutions maintained a 24-hour answering service for that purpose and provided the telephone number. The policy required Ms. Paulus to also contact the company where she was scheduled to work. Ms. Paulus was aware of the requirement that she notify Team Staffing Solutions of her absences and followed the policy on at least one occasion.

While Ms. Paulus was in the assignment at Raymond Corporation, she completed training on the first shift and then moved to her third-shift position on January 1, 2007. The third-shift hours were 10:00 p.m. to 6:30 a.m., Sunday through Thursday. Ms. Paulus' supervisor was Quality Control Manager John Blalock. Ms. Paulus also took direction from Team Lead Gary Dipple. Ms. Paulus last appeared for the assignment on the evening of Thursday, February 22. Ms. Paulus had concluded she was not well suited for the assignment and could not master all of the requirements of the assignment.

On Sunday, February 24, a snowstorm passed through Ms. Paulus' community and interrupted her electrical service. Ms. Paulus did not appear for her evening shifts on February 25, 26, 27, 28, or March 1. Ms. Paulus did not notify Team Staffing Solutions of any of these absences. Ms. Paulus had been reporting the absences to Raymond Corporation. Ms. Paulus had reported her absences to Mr. Blalock on February 25, 26, 27, and 28. On March 1, Ms. Paulus left a message for Mr. Blalock. The essence of the message was that since Ms. Paulus had already missed several shifts that week, she thought she would just take March 1 off.

On March 1, Ms. Paulus contacted Team Staffing Solutions Account Executive Mary Kirchner and left a message. Ms. Paulus wanted to speak with Ms. Kirchner regarding her desire to leave the assignment. On March 2, Ms. Kirchner returned Ms. Paulus' phone call. Raymond Corporation had notified Ms. Kirchner that Ms. Paulus had been calling in absences for several shifts. Ms. Kirchner asked Ms. Paulus why she had not been reporting to work. Ms. Paulus did not reference anything about the February 24 snowstorm at that time. Ms. Paulus told Ms. Kirchner that she did not believe she was performing to Raymond Corporation's requirements and would not be offered a permanent position until she mastered the requirements. Ms. Paulus wanted to leave the assignment, but was concerned about the impact on her eligibility for unemployment insurance benefits if she voluntarily left the assignment. Ms. Paulus told Ms. Kirchner that she was waiting to be removed from the assignment. Ms. Paulus told Ms. Kirchner that she had been interviewing for another position. Ms. Kirchner asked Ms. Paulus whether she would be willing to continue to report to the assignment if Raymond Corporation would allow her to continue after all of the absences. Ms. Paulus indicated that she would be willing to report. Ms. Kirchner contacted Raymond Corporation, which was unwilling to allow Ms. Paulus to continue in the assignment because of her absences.

Ms. Paulus had also failed to properly notify Team Staffing Solutions of absences on February 18 and 19.

Ms. Paulus established an "additional claim" for benefits that was effective March 4, 2007 and has received benefits totaling \$1,388.00.

#### **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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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. Paulus' absences were a deliberate attempt to provoke Raymond Corporation to discharge her from the assignment. The evidence indicates that Ms. Paulus was well aware of the requirement that she notify Team Staffing Solutions of her need to be absent from the assignment and failed to notify the temporary employment agency of her absences on February 25, 26, 27, 28 and March 1. The greater weight of the evidence fails to support Ms. Paulus' contention that her absences were attributable to the February 24 snowstorm. The evidence indicates that Ms. Paulus was not due to return to work until late evening on February 25. The evidence indicates that even if the absence on February 25 could reasonably be attributed to the February 24 snowstorm, the subsequent absences could not be. The evidence establishes at least four consecutive unexcused absences. These followed absences on February 18 and 19 that were unexcused because Ms. Paulus failed to properly notify Team Staffing Solutions. The unexcused absences were excessive.

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

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. Paulus has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Paulus must repay to Iowa Workforce Development. Ms. Paulus is overpaid \$1,388.00.

**DECISION:**

The Agency representative's March 28, 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 paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$1,388.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs