

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GINNETTE SHELEY
Claimant

APPEAL NO. 07A-UI-07902-JTT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

MAXIMUS
Employer

**OC: 07/15/07 R: 02
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:

Maximus Inc. filed a timely appeal from the August 9, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 4, 2007. Claimant Ginnette Sheley participated. Rick Flowers, Operations Manager, represented the employer and presented additional testimony through Audrey Vairo, Project Manager, and Vicky Contreres, Senior Administrator and Human Resources Manager. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibit One 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.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ginnette Sheley was employed by Maximus Inc. as a full-time Customer Service Representative Team Lead from January 6, 2003 until July 3, 2007, when Operations Manager Rick Flowers discharged her for attendance. Mr. Flowers was Ms. Sheley's immediate supervisor. Ms. Sheley's work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday.

The employer had a written attendance policy that required Ms. Sheley to contact her immediate supervisor or the Senior Administrator if Ms. Sheley needed to be absent. The policy did not provide a time by which Ms. Sheley needed to contact the employer. Ms. Sheley was aware of the policy.

In June 2006, the employer transferred several positions, including Ms. Sheley's position, from Des Moines to Marshalltown. The employer initially offered a Rideshare van from Des Moines to Marshalltown, but discontinued the program due to a lack of passengers. Thereafter, Ms. Sheley carpooled with coworkers.

The final absence that prompted the discharge occurred on June 25, 2007, when Ms. Sheley was absent because she lacked transportation to the Des Moines carpool rendezvous site. Ms. Sheley notified Senior Administrator Vicky Contreras that she would be absent. Ms. Sheley always notified the employer if she was going to be late or absent.

Ms. Sheley's prior absences for 2007 were as follows: On February 6, Ms. Shelley was absent, but the employer does not know the reason for the absence. On February 7, 8, 9, 12, and 13, Ms. Sheley was tardy due to transportation issues. On one or more of these days, weather conditions delayed the carpool commute to Marshalltown or made travel slow between Des Moines and Marshalltown. The employer issued verbal warnings to Ms. Sheley in January and February. On March 5, the employer issued Ms. Sheley a "final written warning" for attendance. Ms. Sheley had no absences in March and April, during which time a coworker picked her up every day and took her to the carpool rendezvous. After this coworker took a different job, Ms. Sheley was absent due to transportation issues on May 3, 7, 8, 10, and 23. On these days, Ms. Sheley did not have transportation to the carpool rendezvous. On June 4 and 22, Ms. Sheley was absent due to illness and properly notified the employer.

Ms. Sheley established a claim for unemployment insurance benefits that was effective July 15, 2007. Iowa Workforce Development authorized benefits in the amount of \$1,800.00, but applied the benefits to a prior unsatisfied overpayment.

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 evidence establishes that the final absence on June 25 was an unexcused absence under the applicable law. The evidence further establishes unexcused absences on May 3, 7, 8, 10, and 23. The evidence indicates that Ms. Sheley's June 4 and 22 absences were for illness properly reported to the employer and, therefore, were excused absence under the applicable law. The employer offered no testimony to rebut Ms. Sheley's testimony that the instances of tardiness in February were due to inclement weather that delayed or slowed travel. The weight of the evidence is insufficient to establish that any of the February absences should be deemed unexcused. The May absences and the June absence, in the context of the prior warnings Ms. Sheley had received and in light of the fact that each was due to the same issue with transportation, establish excessive unexcused absences.

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

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. Sheley has received unemployment insurance benefits for which she has been deemed in eligible, those benefits constitute overpayment which Ms. Sheley must repay to Iowa Workforce Development. Ms. Sheley is overpaid \$2,520.00.

DECISION:

The claims representative's August 9, 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 \$2,520.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw/kjw