

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

KATHY J SHIRLEY  
3384 MONTECELLO AVE  
WATERLOO IA 50701-4615

BLACK HAWK COUNTY  
C/O PERSONNEL DIRECTOR  
316 E 5<sup>TH</sup> ST  
WATERLOO IA 50703

Appeal Number: 06A-UI-04532-JTT  
OC: 03/26/06 R: 03  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Kathy Shirley filed a timely appeal from the April 17, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on June 16, 2006 and completed on June 19, 2006. Claimant participated and presented additional testimony through her husband, Jeff Shirley, friend Kay Sutherland, and union local president Mike Prideaux. Human Resources Director June Watkins represented the employer and presented additional testimony through Program Manager Arlene Prather-Okane, R.N., Receptionist Willie Monroe, Administrative Assistant Fran Guild, Division Manager Rhonda Bottke, and Health Department Director Tom O'Rourke. Exhibits One, Three through Six, B, C, F, and H were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kathy Shirley was employed by Black Hawk County as a full-time medical records typist in the County's health department from September 5, 1996 until March 8, 2006 when she quit. Ms. Shirley had been absent due to illness during most of the two weeks that preceded the date of her quit. On February 28, Ms. Shirley had contacted Dr. Kent Opheim, M.D., because she was suffering from vertigo, vomiting, and diarrhea. At that time, Dr. Opheim prescribed Meclizine to address Ms. Shirley's condition. Ms. Shirley's condition did not improve. On March 1, Dr. Opheim examined Ms. Shirley and noted that Ms. Shirley was suffering from headache, neck and shoulder muscle stiffness. Dr. Opheim prescribed Diazepam for Ms. Shirley's headache and vertigo and recommended that Ms. Shirley undergo physical therapy. After additional lab tests were completed, Dr. Opheim prescribed valium. Dr. Opheim then prescribed Zoloft. Ms. Shirley continued to be absent from work due to illness and returned to work on March 7. Ms. Shirley was still experiencing health problems, including vertigo, when she returned to work. Ms. Shirley returned to work because a report for which she was responsible was due, Ms. Shirley's immediate supervisor was due to leave for vacation, and Ms. Shirley did not want her illness to hinder timely completion of the report. Ms. Shirley had discussed the details of her health and medications with her immediate supervisor, Division Supervisor Rhonda Bottke.

On March 7, Ms. Shirley's husband went to work with her to assist with organizing materials for the report. Mr. Shirley suffered traumatic injury several years ago and depends on a powerful prescription narcotic pain medicine called Actiq to deal with severe headaches. The Actiq is in the form of "suckers" that Mr. Shirley must hold in his mouth for several minutes to release the medicine. Mr. Shirley uses several of the Actiq suckers each day. Ms. Shirley has assumed a caretaker role for her husband. When Mr. and Mrs. Shirley are away from home, Ms. Shirley carries the Actiq in her purse. When Mr. Shirley is done with an Actiq sucker, he gives the stick and/or medicine container to Ms. Shirley and she stores these in her purse until she eventually throws the medicine packaging away. Mr. Shirley used one or more Actiq suckers at Ms. Shirley's workplace on March 7 while he was helping with the report. Ms. Shirley had discussed the details of her husband's health issues and medications with Division Supervisor Rhonda Bottke and had otherwise informed the employer of the caretaking duties she fulfilled in connection with her husband's medical condition.

On March 8, Ms. Shirley again reported to work to complete the report that was due. Ms. Shirley was still ill and was still being treated with multiple medications. During the morning, receptionist Willie Monroe went to meet with Ms. Shirley to prepare for a C.P.R. test that was to take place after the noon hour. Ms. Monroe waited more than 15 minutes for Ms. Shirley to emerge from the fourth floor women's restroom. Ms. Shirley continued in the restroom so long that Ms. Monroe returned to the area even after her break time had expired, out of concern for Ms. Shirley. Ms. Shirley wears ill-fitting dentures that cause painful sores on her gums and uses a gel to sooth the pain in her gums. Ms. Shirley would frequently spend several minutes in the restroom applying the gel to her gums to relieve pain. Ms. Bottke was aware of the situation regarding Ms. Shirley's gums and her use of the gel at work. Ms. Shirley frequently spent upwards of two hours per day in the women's restroom. On March 8, when Ms. Shirley emerged from the women's restroom, Ms. Monroe observed that Ms. Shirley's gait was unsteady and unbalanced. Shortly thereafter, Administrative Assistant Fran Guild overheard Ms. Shirley say that was not "tracking well" as she and Ms. Monroe studied together for the C.P.R. test. Ms. Monroe later rode as a passenger in Ms. Shirley's car to the C.P.R. test site. Ms. Monroe had ridden with Ms. Shirley on many occasions. Ms. Monroe was concerned

about Ms. Shirley's lack of attention or alertness to other traffic and Ms. Shirley's delayed response to traffic signals. Ms. Monroe would have to prompt Ms. Shirley to respond to traffic lights. Ms. Monroe reported her concerns to Program Manager Arlene Prather-Okane that afternoon.

While Ms. Shirley was at the C.P.R. test site, she had difficulty reading the test questions on the written test. Ms. Shirley had an outdated reading glasses prescription. A nurse offered to read the questions to Ms. Shirley so that Ms. Shirley could complete the written portion of the test. Though Division Manager Rhonda Bottke was out of the office that day, she participated in the C.P.R. training and was in the room with Ms. Shirley for the written portion of the C.P.R. test. Ms. Bottke observed that Ms. Shirley appeared disheveled, which was not in keeping with Ms. Shirley's usual appearance.

After the C.P.R. test, Ms. Shirley returned to the work place without incident. However, by this point in the day, a number of health department employees had expressed concerned about Ms. Shirley's out of the ordinary behavior. During the course of the afternoon, Administrative Assistant Fran Guild and Budget Administrator Mary Reekers located the wrapper for an Actiq sucker in the sanitary napkin waste basket inside a stall in the fourth floor women's restroom. Ms. Guild looked up information regarding Actiq on the internet. Ms. Guild noted that the Internet information indicated the Actiq sucker had to be held in the mouth for approximately 15 minutes while the sucker dissolved and the medication was released. Ms. Guild noted that the length of time needed to deliver the medication corresponded to the length of time Ms. Shirley had been in the women's restroom that morning. Ms. Guild also noted that one side effect of the medication was confusion and recalled that Ms. Shirley had seemed disoriented shortly after leaving the restroom that morning. Ms. Guild contacted Rhonda Bottke by telephone to share her concerns. Ms. Bottke directed Ms. Guild and Ms. Reekers to share their concerns with Health Department Tom O'Roark. Ms. Guild and Ms. Reekers spoke to Mr. O'Roark and Program Manager Arlene Prather-Okane at 3:00 p.m. At this time, Ms. Monroe was called upon to share her concerns about the car ride to the C.P.R. test site. Mr. O'Roark decided to have Ms. Prather-Okane request that Ms. Shirley submit to a drug test pursuant to the County's drug free workplace policy.

At approximately 4:30 p.m. Ms. Prather-Okane summoned Ms. Shirley to a meeting in a conference room. At that time, Ms. Prather-Okane outlined the concerns that had been raised about Ms. Shirley throughout the day. Ms. Prather-Okane requested that Ms. Shirley submit to a drug test. Ms. Shirley told Ms. Prather-Okane that the employer already knew that he had been ill and that she was on multiple prescription medications. Ms. Shirley listed the prescription medications she was taking. Ms. Prather-Okane was in fact aware of Ms. Shirley's history of headaches and dizziness. Ms. Shirley indicated that the matter must be a misunderstanding, that Ms. Prather-Okane should speak with Ms. Bottke, and that the misunderstanding could be readily resolved if the employer contacted Ms. Shirley's doctor. Ms. Shirley expressed concern that she would of course test positive for drugs, given the multiple prescription medications she was taking.

Ms. Prather-Okane took a decidedly heavy-handed approach to the meeting with Ms. Shirley and the request for the drug test. Ms. Prather-Okane declined to contact Ms. Bottke or Ms. Shirley's doctor and pressed for the drug test. Ms. Shirley expressed concern that the employer was making such a request without arranging for a union representative to be present. Ms. Prather-Okane told Ms. Shirley that she had no right to such representation in connection with the request. Despite this assertion, the employer made attempts to contact a union representative. Two representative's indicated they were out of town and therefore not

available. Union local president Mike Prideaux would have been available to participate. Mr. Prideaux had been at a medical appointment and had returned to his car to see that two calls had been made to his cell phone. The employer had attempted to contact Mr. Prideaux, but had left no messages on his cell phone. Ms. Shirley requested to see a copy of the employer's drug free workplace policy to see whether the policy provided for union representation. Ms. Prather-Okane directed Ms. Guild to make Ms. Shirley a copy of the policy, which Ms. Shirley then reviewed. Ms. Shirley then indicated that she would like to have her attorney present for the test request. Ms. Prather-Okane told Ms. Shirley that the employer did not need to allow her to do that. Ms. Prather-Okane told Ms. Shirley that the two needed to get going to the test facility and that Ms. Shirley's attorney could meet them there. Mr. O'Roark had been standing by outside the conference room and had been receiving updates from Ms. Guild. Mr. O'Roark decided that Ms. Shirley should be allowed to contact her attorney. Ms. Shirley requested a telephone book so she could contact her attorney and then requested privacy in the conference room while she contacted her attorney. Ms. Prather-Okane told Ms. Shirley that she was not entitled to privacy. Ms. Prather-Okane then did leave Ms. Shirley alone in the conference room so she could contact her attorney. Ms. Shirley discovered that the telephone in conference room did not work. During this exchange, Ms. Prather-Okane announced to Ms. Shirley, repeatedly, that if Ms. Shirley did not cooperate with the employer's request for a drug test, the employer would summon the sheriff to compel Ms. Shirley's compliance. This was a threat to have Ms. Shirley taken into custody, that is, arrested, and transported to the test facility so that she could then be compelled to submit to the test. When Ms. Shirley told Ms. Prather-Okane that the telephone in the conference room did not work, Ms. Prather-Okane directed Ms. Shirley across the hall to Ms. Guild's office so that she could use the phone to summon her attorney. At the same time, Ms. Prather-Okane was pressing the fact that it was nearly 5:00 p.m. and that Ms. Prather-Okane and Ms. Shirley needed to be at the test site by 5:00 p.m., needed to get going immediately, and that Ms. Shirley's attorney could meet them there. At this point, Ms. Shirley said, "I'm out of here." Mr. O'Roark had been listening to the exchange between Ms. Prather-Okane and Ms. Shirley and followed Ms. Shirley down the stairs to her office area. Ms. Shirley went to her office area and gathered up most of her belongings, until her arms were full, and then headed to the door. Mr. O'Roark asked Ms. Shirley to think about the implications of refusing the employer's request for a breath test and advised her that a decision to leave the workplace under the circumstances amounted to a permanent decision to leave the employment. Ms. Shirley told Mr. O'Roark that she thought it was unfair that she could not talk to counsel before going for the test. Ms. Shirley announced that she knew what she was doing and then left. Ms. Shirley returned a short while later to collect her briefcase.

On March 9, Mr. O'Roark reported the incident to Human Resources Director June Watkins. Ms. Shirley did not report for work. On March 9 or 10, Ms. Shirley contacted Ms. Watkins and asserted that she had not quit the employment. Ms. Watkins then put Ms. Shirley on "investigative suspension" while she looked into the events of March 8. The investigation included a meeting with Ms. Shirley, Mr. Shirley, and union local president Mike Prideaux on March 16. After that meeting, Ms. Watkins recommended to Health Department Director Tom O'Roark and to the County Board of Supervisors that Ms. Shirley be discharged. The County formally terminated Ms. Shirley's employment on March 27.

The employer is a public employer and Ms. Shirley was a public employee. The employer has a written drug-free workplace policy set forth in an employee handbook. On February 6, 2006, Ms. Shirley signed her acknowledgment of receipt of the updated handbook that went into effect on January 1, 2006. The drug-free workplace policy contains a provision for probable cause testing as follows:

A. The County may require an employee to submit to a probable cause drug or alcohol test when there is reason to believe that possible drug or alcohol misuse or abuse is adversely affecting job performance or endangering the safety of the employee, co-workers, the general public, or County property. A probable cause referral for testing may be made by a supervisor or Department Head on the basis of specific describable observations concerning the employee's work performance, appearance, behavior, or speech (e.g., unsteady balance, slurred speech, inability to maintain concentration, odor of alcohol on or about the employee's person, poor coordination, dilated pupils, erratic behavior, etc.), or other specific observations that would lead a reasonable person to conclude the employee's performance is impaired or that the employee is under the influence.

B. The provisions of Section 405.4 above will apply for violations. In addition, an employee who refuses to submit to a drug test under the provisions of this policy may also be subject to discipline as provided in Section 406 "Discipline Policy" of this handbook.

#### REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether Ms. Shirley voluntarily quit the employment or was discharged.

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. See 871 IAC 24.25.

The employer asserts that Ms. Shirley quit the employment on March 8. The employer points to several factors as indication of a quit. These include Ms. Shirley's comment, "I'm out of here," Ms. Shirley's conduct in collecting her personal effects from her work station, and the discussion between Mr. O'Roark and Ms. Shirley about the permanency of her decision to leave the workplace on March 8. Ms. Shirley asserts that she did not quit, but left on March 8 to avoid unfair treatment and to have an opportunity to seek counsel about the requested drug test. The evidence indicates that from March 9 to March 27, the employer treated the matter as a disciplinary suspension pending discharge. The administrative law judge concludes that the greater weight of the evidence in record indicates that Ms. Shirley did not quit on March 8, but was instead suspended March 9 and discharged March 27.

The remaining question is whether the evidence in the record establishes that Ms. Shirley was discharged for misconduct in connection with the employment. It does not.

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).

The evidence in the record establishes that the employer did in fact have probable cause to request a drug test on March 8. However, the evidence in the record also indicates that Ms. Prather-Okane's conduct and comments on March 8 far exceeded those necessary and appropriate to make a reasonable request for a drug test. Further, Ms. Prather-Okane's conduct and comments are not supported by any protocol spelled out in the employer's written drug-free workplace policy. As a public employee, Ms. Shirley was entitled to additional constitutional protections that might not be available to a private sector employee. Ms. Prather-Okane's "request" for the drug test was not a request at all. Instead, Ms. Prather-Okane *ordered* Ms. Shirley to cooperate and threatened to summon law enforcement authorities to coerce Ms. Shirley's submission to the test. Included in this threat of use of force was the threat of being taken into police custody. Ms. Prather-Okane's conduct and comments brought into play Ms. Shirley's constitutional rights under the Fourth Amendment of the Constitution of the United States of America to be free of unreasonable search and seizure and made Ms. Shirley's refusal to cooperate reasonable. Based on the evidence in the record, the administrative law judge concludes there was no valid request for a drug test and, therefore, no refusal of a valid request for a drug test. Accordingly, the evidence in the record fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Shirley for unemployment insurance benefits.

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

DECISION:

The Agency representative's decision dated April 17, 2006, reference 01, is reversed. 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.

jt/pjs