

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

TAMMY HOSCH  
114 N WALNUT  
MAQUOKETA IA 52060

L A LEASING INC  
SEDONA STAFFING  
612 VALLEY DR  
MOLINE IL 61265

Appeal Number: 06A-UI-03746-JTT  
OC: 12/11/05 R: 04  
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.

---

(Administrative Law Judge)

---

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Claimant Tammy Hosch filed a timely appeal from the March 24, 2006, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on April 20, 2006. Ms. Hosch participated. Unemployment Benefits Administrator Colleen McGuinty represented the employer and presented additional testimony from Maquoketa Branch Manager Carrie Gilson.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tammy Hosch commenced her employment with Sedona Staffing temporary employment agency on December 27, 2005. On January 4, 2006, Ms. Hosch began her last assignment, a full-time, second-shift position at Plastipaint. On March 9, a Plastipaint supervisor and Sedona Staffing

Branch Manager Carrie Gilson decided to discharge Ms. Hosch from the assignment based on attendance.

The final absence that prompted the discharge occurred on March 9. Ms. Hosch was scheduled to work at 4:00 p.m. Ms. Hosch had worked a 12-hour shift at Plastipaint the previous day and did not awake on March 9 until noon. When Ms. Hosch awoke, she was sick. Ms. Hosch made an appointment with the doctor for 4:30 p.m. on March 9, the earliest appointment the doctor had available. At approximately 1:00 p.m., Ms. Hosch notified Sedona Staffing that she would be late arriving for work at Plastipaint, due to the doctor's appointment. The Sedona representative told Ms. Hosch that she would notify Plastipaint. Ms. Hosch went to her doctor appointment and arrived back home to find a message on her answering machine from the Sedona Staffing representative, who notified Ms. Hosch that she had been discharged from the assignment and instructed her to call Sedona Staffing the next day. On March 10, Ms. Hosch contacted the Sedona Staffing representative, but the employment agency did not have a new assignment available for Ms. Hosch. The employment agency never provided Ms. Hosch with another employment assignment.

Sedona Staffing's attendance policy governed Ms. Hosch's employment. Under the policy, Ms. Hosch was required to contact Sedona Staffing at least 30 minutes prior to the scheduled start of her shift if she needed to be absent or late. Sedona staffing would in turn notify the client business. Ms. Hosch complied with this policy on March 9.

Prior to March 9, 2006, Ms. Hosch had most recently been absent or tardy on February 16, 2006, when she lacked transportation to work.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Hosch was discharged from the assignment 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).

In order for Ms. Hosch's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 in the record establishes that Ms. Hosch's absence on March 9, 2006, was for illness properly reported to the employer and, therefore, an excused absence under Iowa law. Because the final absence that prompted the discharge was an excused absence, the evidence in the record fails to establish a current act of misconduct that might serve as a basis for disqualifying Ms. Hosch for unemployment insurance benefits. Accordingly, the administrative law judge need not consider whether the prior absences were excused or unexcused.

The employer did not assert that Ms. Hosch failed to contact the temporary employment agency within three working days of the completion of an assignment, and the evidence in the record would not support such an assertion. See Iowa Code section 96.5(1)(j).

Unemployment Benefits Administrator Colleen McGuinty and Maquoketa Branch Manager Carrie Gilson provided conflicting evidence on the issue of whether Ms. Hosch's discharge from the assignment at Plastipaint was also a discharge from Sedona Staffing. Ms. McGuinty testified unequivocally that Ms. Hosch was discharged from Sedona Staffing. Ms. Gilson testified that Ms. Hosch would have to "prove" herself in her next assignment in order to continue in the employment relationship with Sedona Staffing. The weight of the evidence in the record indicates that Ms. Hosch's discharge from the assignment was, in fact, also a discharge from the relationship with Sedona Staffing.

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

DECISION:

The Agency representative's decision dated March 24, 2006, reference 03, 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/kjw