

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SHAWNICE COLEMAN

Claimant

APPEAL NO. 18A-UI-08943-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALORICA GLOBAL SOLUTIONS INC

Employer

OC: 07/29/18

Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 14, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant had been discharged on July 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 10, 2018. Claimant Shawnice Coleman participated. Turkessa Newsone represented the employer and presented additional testimony through Carissa Stafford. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 and 3 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shawnice Coleman was employed by Alorica Global Solutions, Inc. as a full-time customer service representative from December 2016 until July 30, 2018, when Turkessa Newsone, Human Resources Generalist, discharged her from the employment for attendance. Ms. Coleman's work hours were 6:00 a.m. to 2:00 p.m. on Sunday and 8:00 a.m. to 4:30 p.m. on Monday

through Thursday. Team Lead Jason Morales was Ms. Coleman's immediate supervisor. Mr. Morales reports to Carissa Stafford, Operations Manager. If Ms. Coleman needed to be absent from work, the employer's absence reporting policy required that Ms. Coleman telephone the workplace no later than two hours after the scheduled start of her shift and speak with a Team Lead or the Operations Manager to give notice of her need to be absent. The employer reviewed the attendance policy, including the absence reporting policy, with Ms. Coleman at the start of the employment.

The final absence that triggered the discharge occurred on July 30, 2018, when Ms. Coleman was absent due to a lack of transportation. Ms. Coleman had also been absent due to a lack of transportation on July 29, 2018. Ms. Coleman had been using a borrowed vehicle to get to work, but lost use of that vehicle when it was repossessed. On July 28, Ms. Coleman notified Ms. Stafford of her transportation issues. Ms. Stafford told Ms. Coleman that she could not approve the absence, but directed Ms. Coleman to contact Turkessa Newsone, Human Resources Generalist, on Monday, July 30, to see whether Ms. Newsone would approve the absence. There was no agreement between Ms. Coleman and the employer for the employer to assist with Ms. Coleman's transportation to work. Ms. Coleman lived in Davenport and the workplace was in Davenport. Ms. Newsone declined to approve the absence. On July 30, Ms. Newsone notified Ms. Coleman that she was discharged for attendance.

The employer considered an extended pattern of tardiness and prior reprimands for attendance when making the decision to discharge Ms. Coleman from the employment. The employer had issued written reprimands to Ms. Coleman on July 3 and 17, 2018. Prior to the final absences, Ms. Coleman had been tardy for personal reasons 37 times between February 28, 2018 and July 26, 2018. These included 10 late arrivals in July 2018. On these days, Ms. Coleman was simply running late as she got her children up and about and as she made her way to work.

Ms. Coleman established an original claim for unemployment insurance benefits that was deemed effective July 29, 2018. Iowa Workforce Development set Ms. Coleman's weekly benefit amount at \$301.00. Ms. Coleman received \$2,107.00 in benefits for the seven weeks between July 29, 2018 and September 15, 2018. Alorica is a base period employer for purposes of the claim.

On August 13, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Coleman's separation from the employment. The employer's representative of record, Equifax, has given notice to the Iowa Workforce Development that Ms. Newsone would represent the employer at the fact-finding interview. Prior to the fact-finding interview, Ms. Newsone had notified Equifax that she would not be available for the fact-finding interview due to the need to take her daughter to college out of state. Equifax did not contact Iowa Workforce Development to update the employer contact information for the fact-finding interview. At the time of the fact-finding interview, the deputy attempted to reach Ms. Newsone at the number Equifax had provided for Ms. Newsone. When Ms. Newsone did not answer, the deputy left a voice mail message. The employer submitted no documentation for the fact-finding interview to prove a discharge for misconduct. Ms. Coleman participated in the fact-finding interview and provided a statement in which she intentionally misrepresented her conversation with Ms. Stafford by falsely asserting that Ms. Stafford had approved her absences on July 29 and 30. Ms. Coleman falsely asserted that she had not received prior written reprimands for attendance, when she had received two such reprimands during the final month of the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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). 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment, based on excessive unexcused absences. The evidence establishes 39 unexcused absences between February 2018 and the July 30, 2018, discharge. In each, Ms. Cole was either late or completely absent for matters of personal responsibility, including transportation, getting her children up and about, and budgeting her time so that she could get to work on time. Ms. Coleman's final absences occurred in the context of two recent written reprimands. Ms. Coleman was fully aware that her employment was in jeopardy due to her attendance. The weight of the evidence establishes that Ms. Stafford made clear to Ms. Coleman on July 28 that she would not approve the absences on July 29 and 30 and directed Ms. Coleman to take the matter up with Ms. Newsone on July 30. Ms. Coleman's extensive pattern of tardiness and the final absences due to transportation issues demonstrated an intentional and substantial disregard of the employer's interests. Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Ms. Coleman is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Coleman must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Coleman received benefits, but this decision disqualifies her for those benefits. Accordingly, Ms. Coleman is overpaid \$2,107.00 in benefits for the seven weeks between July 29, 2018 and September 15, 2018. The employer did not participate in the fact-finding interview. Because Ms. Coleman made intentionally and materially false statements at the fact-finding interview, she is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to Ms. Coleman.

DECISION:

The August 14, 2018, reference 01, decision is reversed. The claimant was discharged on July 20, 2018 for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,107.00 in benefits for the seven weeks between July 29, 2018 and September 15, 2018. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs