

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA L MEYERS
Claimant

APPEAL NO. 08A-UI-06013-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WALGREEN CO
Employer

OC: 05/18/08 R: 04
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Diana Meyers filed a timely appeal from the June 25, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 13, 2008. Ms. Meyers participated. Alyce Smolsky of TALX UC eXpress represented the employer and presented testimony through Store Manager Paul Gorhamson. The hearing in this matter was consolidated with the hearing in Appeal Number 08A-UI-06014-JTT. Exhibits One through Four and A through F were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Was Ms. Meyers discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Diana Meyers was employed by Walgreen Company as a full-time service clerk from December 16, 2003 until May 12, 2008, when Store Manager Paul Gorhamson discharged her for repeated tardiness. Mr. Gorhamson was Ms. Meyer's immediate supervisor. The final incident of tardiness occurred on May 8, 2008. Ms. Meyers was 30 minutes late for her scheduled shift. Ms. Meyers had either erroneously recorded or misremembered her scheduled start time. Ms. Meyers had laid down for a nap and did not awake until her grandchild awakened her and reminded her that she needed to go to work. The schedule that included the May 8 shift had been posted on April 24, 2008 and had been available for Ms. Meyers to review since that date. Ms. Meyers had also been tardy for personal reasons on May 4 and 6. Ms. Meyers was also tardy for personal reasons five times in January, 10 times in February, four times in April. Ms. Meyers' tardiness was generally attributable to delays in getting her grandchildren off to school and daycare. Ms. Meyers has had custody of her grandchildren for three and a half years. The employer twice adjusted Ms. Meyers' start time in an attempt to accommodate Ms. Meyers' childcare responsibilities and get Ms. Meyers to work on time. Ms. Meyers initially responded well to the change in start time, but reverted to her pattern of tardiness. The employer issued repeated warnings for excessive tardiness. When Ms. Meyers arrived late on

May 8, Mr. Gorhamson told her she might face discharge and sent her home for the day. Ms. Meyers worked on May 9. Ms. Meyers appeared for work on May 12 and worked part of her shift before Mr. Gorhamson told her she was discharged for repeated tardiness.

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 greater weight of the evidence in the record establishes that the final incident of tardiness was based on Ms. Meyers erroneously documenting her start time and/or Ms. Meyers oversleeping. The absence was an unexcused absence under the applicable law. The greater weight of the evidence indicates that the many prior incidents of tardiness were attributable to Ms. Meyers' general childcare responsibilities and were also unexcused absences under the applicable law. Ms. Meyers' tardiness was in fact excessive and continued even after the employer had issued repeated warnings.

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

DECISION:

The Agency representative's June 25, 2008, reference 01, decision is affirmed. 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 shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs