

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL STEWART
Claimant

APPEAL NO. 12O-UI-13893-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

OC: 07/29/12
Claimant: Appellant (1-R)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge pursuant to an Employment Appeal Board remand for new hearing in Hearing Number 12B-UI-10073. The underlying decision being appealed by Ms. Stewart is the August 17, 2012, reference 01, decision that denied benefits. After due notice was issued, a new appeal hearing was held on December 13, 2012. Ms. Stewart participated. Briana Lindenbaum of Equifax Workforce Solutions represented the employer and presented testimony through Jessica Blum and Mike Kelly.

ISSUE:

Whether Ms. Stewart was 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: Crystal Stewart was employed by AT&T Mobility Services as a full-time customer service representative from 2010 until July 30, 2012, when Jessica Blum, Team Manager, and Stephanie Neverton, Human Resources Manager, discharged her for attendance.

The employer's policy required that Ms. Stewart called the automated absence reporting line prior to the scheduled start of her shift if she needed to be absent. Under the employer's attendance policy, the employer considered absences during a 12-month rolling period when determining whether an employee had accrued the eight attendance points that would subject them to possible discharge from the employment. Ms. Stewart was aware of the attendance policy, including the absence reporting requirements and the maximum allowable number of attendance points.

The absence that triggered the discharge occurred on July 11, 2012, when Ms. Stewart was absent the whole day so that she could provide childcare for members of her extended family after her nephew was arrested. Ms. Stewart properly notified the employer of her need to be absent. The absence on July 11 placed Ms. Stewart over the allowable number of attendance points and subjected her to possible discharge from the employment.

On July 13, 2012, Ms. Stewart was absent for the second half of her shift. Ms. Stewart had been stopped by law enforcement for speeding as she was returning to work at the end of her lunch break. Ms. Stewart knew she would be late returning from her lunch break and used the automated absence reporting line to notify the employer that she was not going to return to work after her lunch break. Ms. Stewart had decided at 2:18 p.m. that since she would incur an attendance point for the absence, there was no point in returning to work to the 6:00 p.m. end of the shift.

On July 17, Ms. Blum met with Ms. Stewart to discuss the July 11 and 13 absences. At that time, Ms. Stewart made reference to having a flat tire on July 11, but did not provide a reason for missing the entire shift. Ms. Stewart did mention at that time that she had been stopped by the police on July 13. Ms. Blum told Ms. Stewart that she was speaking to Ms. Stewart to see whether there was any additional information regarding the two absences that should be considered before she referred the matter up the chain of command for further review. Ms. Blum did not say at that time that the further review could result in Ms. Stewart being discharged from the employment.

After Ms. Blum met with Ms. Stewart on July 17, Ms. Stewart was absent three additional days. On July 24 and 25, Ms. Stewart was absent so that she could attend her aunt's funeral in Chicago. Ms. Stewart properly notified the employer on each day she was absent. Prior to the beginning of the two-day absence, Ms. Stewart had notified Ms. Blum of her need to be gone for the funeral and Ms. Blum had agreed to try to find someone to swap shifts with Ms. Stewart. On July 28, Ms. Stewart, for personal reasons, did not return to work after her lunch break. Ms. Stewart used the absence reporting line to notify the employer she would not be returning after lunch.

In making the decision to discharge Ms. Stewart from the employment the employer considered absences going back to December 2, 2011. On December 2, 6, and 27, Ms. Stewart was absent for personal reasons and properly notified the employer. On January 1 and February 20, 2012, Ms. Stewart missed part of a shift due to illness and properly reported the need to be absent to the employer. On March 18 and April 8, 2012, Ms. Stewart missed part of a shift for personal reasons and properly reported the need to be absent to the employer. On May 3, Ms. Stewart was late for the beginning of her shift for personal reasons. On July 9, Ms. Stewart was late returning from lunch for personal reasons.

In making the decision to discharge Ms. Stewart from the employment, the employer considered several reprimands issued to Ms. Stewart for attendance. The employer issued reprimands to Ms. Stewart for attendance on October 11, December 7, and December 29, 2011, and on February 5, February 27, and May 10, 2012. At the time of the May 10 reprimand, the employer warned Ms. Stewart that she was at seven attendance points and that her next attendance point would prompt her discharge from the employment.

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). 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.

The weight of the evidence in the record establishes absences that were unexcused under the applicable law on December 2, 6, and 27, 2011, and March 18, April 8, May 3, July 9, July 11, July 13, and July 28. The absences occurred in the context of multiple reprimands for attendance, including a reprimand on May 10, 2012, when the employer told Ms. Stewart her job was in jeopardy due to attendance. The unexcused absences were excessive and constituted misconduct in connection with the employment. The evidence includes a current act of misconduct, the absence on July 28. Ms. Stewart 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.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's August 17, 2012, 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 will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs