

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENISE A BOSLEY
Claimant

APPEAL NO. 09A-UI-00627-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

OC: 11/02/08 R: 02
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 7, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 30, 2009. The claimant did not respond to the hearing notice instructions to provide a telephone number and did not participate. Kayla Lewis, Staffing Supervisor, represented the employer. Exhibits One and Two were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant, which records indicate that no benefits have been disbursed to the claimant during the current or previous claim year.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. Denise Bosley established her employment relationship with Kelly Services on October 31, 2006 and performed work in three temporary work assignments. The final assignment was a full-time production position at EDS in Des Moines. The assignment started on August 13, 2007. Ms. Bosley's regular working hours were 4:00 p.m. to 12:30 a.m., Monday through Friday. Ms. Bosley's supervisor in the assignment was Andy Scandiffio, EDS Reiman Supervisor. Jessica Trinidad, Staffing Supervisor, supervised Ms. Bosley's assignment on behalf of Kelly Services. Ms. Trinidad separated from Kelly Services in December 2007.

On or about November 7, 2007, Mr. Scandiffio notified Kelly Services that EDS wished to end Ms. Bosley's assignment due to attendance. On November 7, 2007, Ms. Trinidad notified Ms. Bosley that she was discharged from the assignment and discharged from employment with Kelly Services. The final absence that prompted the discharge occurred on November 6, 2007, when Ms. Bosley was absent due to a lack of childcare. Ms. Bosley properly notified the employer of the need to be absent by contacting Kelly Services prior to the start of her shift.

In making the decision to discharge Ms. Bosley from the assignment and from further employment, the client business and the temporary employment agency considered prior attendance matters. On August 22, Ms. Bosley was tardy due to a lack of child care. On August 23, Ms. Bosley was absent for personal reasons. On September 11, Ms. Bosley was tardy due to a lack of child care. On September 13 and 28, Ms. Bosley was absent due to a lack of child care. On October 1, Ms. Bosley was absent for personal reasons. Ms. Bosley had completed a written request for time off, but forgot to turn it in so the employer could record the previously approved absence. On October 30, Ms. Bosley was absent for personal reasons, but the time off had previously been approved by the employer.

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 weight of the evidence establishes that final absence was an unexcused absence under the applicable law because it was based on a lack of child care, a matter of personal responsibility. Ms. Bosley's absences/tardiness on August 22 and 23, September 11, 13, and 28 were also unexcused absences under the applicable law. The October 1 absence was unexcused because Ms. Bosley failed to fully comply with the employer's time off request policy by failing to turn in the time off request. The October 30 absence was an excused absence because it had been approved ahead of time. The administrative law judge concludes that Ms. Bosley's unexcused absences were excessive.

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

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because Ms. Bosley has not received benefits, there is no overpayment issue to address.

DECISION:

The Agency representative's January 7, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct on November 7, 2007. 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 after the November 7, 2007 separation from the above employer. The claimant would have to meet all other eligibility requirements. The employer's account will not be charged.

Because the claimant has received no benefits in the current or previous claim year, there is no overpayment to address.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs