

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEPHANIE L TURNER**  
Claimant

**APPEAL NO. 07A-UI-02277-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACCESS DIRECT TELEMARKETING**  
Employer

**OC: 01/28/07 R: 03  
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

Access Direct Telemarketing (PRC) filed a timely appeal from the February 26, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 21, 2007. Claimant Stephanie Turner did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Ted Arndt of Johnson & Associates represented the employer and presented testimony through Brian Branscomb, Program Manager. The administrative law judge took official notice of the Agency's record concerning benefits disbursed to the claimant.

**ISSUES:**

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

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Stephanie Turner was employed by Access Direct Telemarketing (PRC) as a full-time insurance agent until Program Manager Brian Branscomb discharged her for attendance. The final absence that prompted the discharge occurred on Monday, February 15, 2007, when Ms. Turner was absent and failed to notify the employer. This final "no-call, no-show" absence followed two "no-call, no-show" absences the previous week. On December 12, 2006, the employer issued a written reprimand to Ms. Turner following an absence due to transportation issues on December 11. The employer's policy required Ms. Turner to notify the employer sometime before or during her scheduled shift if she needed to be absent. Ms. Turner was aware of the policy.

Ms. Turner established a claim for benefits that was effective January 28, 2007, and has received \$187.00 in benefits.

## 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.

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).

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 Ms. Turner'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).

Because Ms. Turner did not participate in the hearing, the evidence in the record is limited to the evidence presented by the employer. The evidence in the record establishes that Ms. Turner's final "no-call, no-show" absence, as well as the two that occurred within the previous week, were all unexcused absences. The evidence indicates that Ms. Turner's absence on December 11 was also an unexcused absence. The administrative law judge concludes that three "no-call, no-show" absences within a week constituted excessive unexcused absences.

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

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because Ms. Turner has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Turner must repay to Iowa Workforce Development. Ms. Turner is overpaid \$187.00.

**DECISION:**

The claims representative's February 26, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs