

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANNE M SHAFAR
Claimant

APPEAL NO. 07A-UI-07824-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BILL DORAN CO
Employer

OC: 12/03/06 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Anne Shafar filed a timely appeal from the August 6, 2007, reference 02, decision that denied benefits. After due notice was issued, an in-person hearing was held on September 24, 2007. Ms. Shafar participated. David Marsteller, General Manager, represented the employer and presented additional testimony through Dustin Sorensen, Route Driver Supervisor. Exhibits One, Two, Three, A, B, and C were received into evidence. At the request of the claimant, the administrative law judge took official notice of the documents in the Agency's administrative file that were submitted by the parties for the fact-finding interview.

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: Anne Shafar was employed by Bill Doran Company as a part-time delivery driver from August 21, 2006 until July 13, 2007, when General Manager David Marsteller and Route Driver Supervisor Dustin Sorensen discharged her. The employer is a wholesale florist that services retail florists inside and outside the Des Moines metropolitan area. Mr. Sorensen was Ms. Shafar's immediate supervisor throughout the employment except for a two-month period, March to May, during which time Scott Staudt functioned as Route Driver Supervisor. Ms. Shafar worked 25-45 hours per week, depending on the employer's needs. The "Employee Information Sheet" in Exhibit A indicates that Ms. Shafar was hired for "Part Time – Less than 30 hrs No Benefits." The Workforce Development posting to which Ms. Shafar responded to apply for the position indicated that the position would involve local driving.

In December 2005, prior to commencing the employment, Ms. Shafar was diagnosed with Anxiety Disorder and Post Traumatic Stress Disorder. Ms. Shafar sought the part-time employment with Bill Doran Company only after clearing it with her therapist. Prior to and during the employment, Ms. Shafar's mental health issues were managed through counseling and psychotropic medication.

During the employment, Ms. Shafar primarily delivered to retail establishments in the Des Moines metropolitan area. Ms. Shafar delivered exclusively to Des Moines area establishments from the start of her employment in August 2006 until February 2007. In February 2007, Ms. Shafar spent a few days making out-of-town delivery runs due to the increase in business associated with Valentine's Day. When Ms. Shafar was assigned to deliver outside the Des Moines metropolitan area, she experienced a significant increase in anxiety. After the February out-of-town delivery runs, the employer did not assign Ms. Shafar an out-of-town route until May 21. At that time, the employer frequently assigned Ms. Shafar to out-of-town routes over the course of a two-week period. The sudden increase in out-of-town assignments followed the employer's receipt of a subpoena duces tecum from a law firm that was defending Ms. Shafar's prior employer in a worker's compensation matter. Thereafter, the Mr. Sorensen assigned Ms. Shafar intermittent out-of-town delivery runs and usually made these assignments with short notice to Ms. Shafar.

Ms. Shafar's final out-of-town assignment was on July 2 or 3. On July 3, Ms. Shafar was treated at the Broadlawn emergency room for moderate, constant anxiety. On July 5, 2007, Ms. Shafar saw her therapist, Carol Tershak, Ph.D., Licensed Psychologist. Ms. Shafar obtained a release that indicated she could return to work on July 6, 2007, but that she was restricted to working "30 hrs maximum per week and local driving only." Ms. Shafar provided the medical release to Mr. Marsteller on July 5. Mr. Marsteller contacted Dr. Tershak the same day and asked for clarification. Dr. Tershak restated what she had indicated in the written release. Dr. Tershak indicated that the restriction was temporary and was based on acute illness. Dr. Tershak advised Mr. Marsteller that she would be further evaluating Ms. Shafar on July 11. Mr. Marsteller advised Dr. Tershak that he was not happy with the release and that it did not "fulfill the obligations of hire for a full-time driver with occasional out of town travel." Mr. Marsteller was preparing to go on vacation and decided to delay taking further action on the note until he returned on July 13.

On July 13, Mr. Sorensen and Mr. Marsteller summoned Ms. Shafar to a meeting at the end of the work day, at which time the employer discharged Ms. Shafar from the employment. The employer cited, as the primary basis for the discharge, Ms. Shafar's inability to perform the essential duties of the employment because of her mental health status. Once Ms. Shafar learned that she was being discharged, she did not stay long. The employer had other concerns regarding customer complaints, coworker complaints and attendance. Regarding attendance, Ms. Shafar had missed six shifts in the course of the employment. All were for illness properly reported to the employer, and three were supported by doctor's notes. The most recent absence had been on June 11. At least one of Ms. Shafar's coworkers complained about her work performance when she was sent on out-of-town delivery runs. The employer had received at least one customer complaint from an out-of-town retailer, who complained that Ms. Shafar lingered too long at the time she made her delivery. The most recent non-attendance related incident had occurred in June.

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 evidence in the record fails to establish misconduct. Though the employer cited a pattern of absences as the basis for the discharge, the evidence in the record indicates no such pattern. Instead, the evidence indicates six absences during the employment, all of which were for illness properly reported to the employer and, therefore, excused absences under the applicable law. The evidence in the record fails to establish that Ms. Shafar was careless or negligent in the performance of her duties or that she engaged in conduct that was in willful or wanton disregard of the interests of the employer. The evidence indicates that the attendance issues, the customer complaints, and the coworker complaints all concerned "past acts," rather than "current acts," and therefore could not serve as the basis for disqualifying Ms. Shafar for unemployment insurance benefits even if misconduct had been established in connection with any of those matters. See 871 IAC 24.32(8). The evidence indicates that the employer discharged Ms. Shafar rather than accommodate her medically-based need to restrict her driving assignments to local routes and to restrict her hours to 30 per week. An employer is under a legal duty to reasonably accommodate disabled workers. See Sierra v. Employment Appeal Board, 508 N.W.2d 719 (Iowa 1993), citing Foods, Inc. v. Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982). The administrative law judge notes that the "Employee Information Sheet" in Exhibit A specifically indicates that Ms. Shafar was hired for "Part Time - Less than 30 hrs No Benefits."

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Shafar was discharged for no disqualifying reason. Accordingly, Ms. Shafar is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Shafar.

DECISION:

The Agency representative's August 6, 2007, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css