

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHANIE H HARRIS
Claimant

APPEAL NO. 11A-UI-09439-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

**OC: 06/19/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Stephanie Harris filed a timely appeal from the July 13, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 9, 2011. Ms. Harris participated. Michelle Hawkins of TALX represented the employer and presented testimony through Patty Richey, Customer Service Hiring Manager; Kris Jackson-Perry, Area Manager for Customer Care and Mobility; and Brandon Kirzeder, AT&T Mobility Customer Service Team Manager.

ISSUE:

Whether the claimant 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: Stephanie Harris was employed by AT&T Mobility Services as a full-time customer service representative from April 2010 until June 22, 2011, when Kris Jackson-Perry, Area Manager for Customer Care and Mobility, discharged her for attendance. Ms. Harris' immediate supervisor from May 1, 2011 onward was Brandon Kirzeder, AT&T Mobility Customer Service Team Manager. During the last month and a half of the employment, Ms. Harris was assigned to work 11:00 a.m. to 8:00 p.m.

The final absence that prompted the discharge was Ms. Harris' early departure from work on June 21, 2011. Ms. Jackson-Perry had met with Ms. Harris shortly before 4:00 p.m. to discuss her status on the employer's attendance point system. Ms. Harris later left work at 5:02 p.m. without speaking to anyone about her need to leave. Mr. Kirzeder was in the workplace at the time Ms. Harris left, but Ms. Harris did not notify him of her need to leave or the reason for the early departure. Ms. Harris had decided to leave for the day immediately after meeting with Ms. Jackson-Perry. Ms. Harris started her lunch hour at 4:00 p.m. and was due back to work at 5:00 p.m. Ms. Harris did not actually return from lunch, but instead called the employer's designated absence reporting line at the end of her lunch hour.

If Ms. Harris needed to be absent from work, the employer's policy required that she telephone a designated phone number. The employer preferred, but did not require, notice before the start of the shift. The employer expected that employees who needed to be absent would take steps to avoid further absences or take steps to apply for a leave of absence. Ms. Harris was aware of the employer's attendance policy.

In making the decision to discharge Ms. Harris from the employment, the employer considered additional absences from the year leading to the discharge. On July 7, 2010, Ms. Harris left work early, but neither she nor the employer recalls why. On July 28, August 6, August 17, and September 7, 2010, Ms. Harris left work early due to illness and provided proper notice. On September 8, 2010, Ms. Harris was absent due to illness and provided proper notice. On October 25, 2010, Ms. Harris was absent for personal reasons. On November 17, 2010, Ms. Harris left for her lunch break at 1:00 p.m. At that time, Ms. Harris was ill. Ms. Harris did not report back from her lunch break, but instead used the telephonic absence reporting system at 2:55 p.m. to indicate that she had left work. Ms. Harris did see a doctor. On November 19, 2010, Ms. Harris was absent due to illness, but had notified the employer the previous evening that she would be absent due to illness and that she had a doctor's note excusing her from returning to work on that day.

Ms. Harris' subsequent absences started in April 2011. On April 4, Ms. Harris left work early due to illness and provided proper notice. On May 20, Ms. Harris was absent due to illness and provided proper notice. On June 2, Ms. Harris was late for personal reasons. On June 6 and 7, Ms. Harris was absent due to illness and provided proper notice. On June 8, Ms. Harris left work early for personal reasons. On June 10, 13, and 14, Ms. Harris was absent due to illness and provided proper notice.

On June 17 and 21, Ms. Jackson-Perry met with Ms. Harris to discuss her attendance points. At those times, Ms. Harris indicated she had not applied for family and medical leave to cover the absences. Ms. Harris told the employer that her health care provider would not provide documentation for some of her recent absences because she had not been in contact with the provider in connection with those absences. Ms. Harris did take subsequent steps to apply for family and medical leave, but that process had not run its course before the employer discharged Ms. Harris from the employment on June 22.

Toward the end of the employment, Ms. Harris was taking an antidepressant for anxiety and depression.

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 establishes unexcused absences on the following dates: October 25, 2010, and June 2, 8, 21, 2011. The balance of the absences that factored into the discharge were absences due to illness properly reported to the employer and therefore were excused absences under the applicable law. An employer cannot tack on additional requirements to alter what would otherwise be an excused absence under Iowa unemployment insurance law. Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). Thus, if Ms. Harris used the employer's telephonic reporting system to notify the employer of an absence that was due to illness, then the absence was an excused absence under the applicable law regardless of whether Ms. Harris applied for or was approved for leave under the Family and Medical Leave Act in connection with the absence. Even after eliminating those absences that were excused absences under the applicable law, the evidence establishes three unexcused absences close in time during June 2011, including the final absence on June 21. The unexcused absences were excessive and constituted misconduct in connection with the employment.

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

DECISION:

The Agency representative's July 13, 2011, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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