

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DONNA L MCDANIEL**  
Claimant

**APPEAL NO. 07A-UI-08466-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SYNOVATE INC**  
Employer

**OC: 10/22/06 R: 03  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Synovate Inc. filed a timely appeal from the August 29, 2007, reference 06, decision that allowed benefits. After due notice was issued, a hearing was held on September 18, 2007. Claimant Donna McDaniel participated. John Wilson of NSN Employer Services represented the employer and presented testimony through Monica Harter, Human Resources Supervisor. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant.

**ISSUES:**

Whether the claimant voluntarily quit the employment by being absent without notifying the employer for three consecutive shifts in violation of the employer's policy.

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Donna McDaniel commenced her employment with Synovate Inc. on May 23, 2007 and worked as a part-time interviewer. Ms. McDaniel's last day at work was on or about July 7, 2007. One hour before Ms. McDaniel's next scheduled shift was to begin, Ms. McDaniel notified receptionist Christina Mowery that she was enroute to the emergency room and could not come to work that afternoon. Ms. McDaniel had been experiencing pain in the side of her abdomen. Ms. McDaniel had intended to appear for work, but the pain in her side had intensified to the point where she concluded she was not able to work and needed to seek emergency treatment. Ms. McDaniel knew that the employer's policy required her to notify the employer's receptionist or the human resources supervisor at least two hours prior to the scheduled start of a shift if she needed to be absent. Because Ms. McDaniel had intended to appear for work until an hour before her shift, she did not notify the employer two hours in advance of the shift.

After Ms. McDaniel spoke to Ms. Mowery, she proceeded to the emergency room and was examined by a physician. The doctor suspected that Ms. McDaniel might be suffering from

kidney stones, gave her pain medication, and advised Ms. McDaniel that she should feel better in a few days. When Ms. McDaniel was finished at the emergency room, she contacted Ms. Mowery. Ms. McDaniel told Ms. Mowery what had happened at the emergency room and advised Ms. Mowery that she would not be able to appear for work for a few days. Ms. Mowery told Ms. McDaniel to let the employer know when she was able to return. Ms. McDaniel advised Ms. Mowery that she had documentation of her emergency room visit that she could provide the employer. Ms. Mowery advised Ms. McDaniel to bring the paperwork in, or to have Ms. McDaniel's husband bring the paperwork in, when she or her husband came to town. Based on this statement, Ms. McDaniel decided to bring the documentation with her when she returned to work.

Ms. McDaniel was absent for three or four shifts before she contacted the employer to advise that she was well enough to return. When Ms. McDaniel contacted the employer, she spoke with Human Resources Supervisor Monica Harter. Ms. McDaniel advised Ms. Harter that she was ready to return to work. Ms. Harter responded that the employer had terminated the employment as a "voluntary quit" because Ms. McDaniel had been absent three shifts without notifying the employer. Ms. McDaniel told Ms. Harter that there must have been a miscommunication and that she had spoken to Ms. Mowery about her need to be absent a few days. Ms. Harter agreed to speak with Ms. Mowery and get back to Ms. McDaniel. When Ms. Harter did not call back, Ms. McDaniel contacted Ms. Harter the next day. At that time, Ms. Harter advised Ms. McDaniel that Ms. Mowery did not recall the conversation with Ms. McDaniel and that the termination would stand.

The employer has a written attendance policy. Ms. Harter had reviewed the policy with Ms. McDaniel as part of orientation on the second day of Ms. McDaniel's employment. The employer was in the process of establishing its business operation at the time Ms. McDaniel had commenced her employment and Ms. McDaniel's orientation occurred in the context of significant interruptions. Though Ms. Harter had Ms. McDaniel sign acknowledgment of the attendance policy, Ms. Harter did not provide Ms. McDaniel with a copy of the attendance policy. The employer does not provide a copy of the attendance policy unless the employee requests it. The policy did not provide guidance regarding what Ms. McDaniel needed to do to notify the employer of an absence expected to last more than one day. The employer had a provision in the attendance policy that equated any number of "no-call, no-show" absences with a voluntary quit. Ms. McDaniel was not aware of the provision.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first question is whether Ms. McDaniel quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. 871 IAC 24.25. A claimant is presumed to have voluntarily quit the employment where the claimant was absent for three days without giving notice to the employer in violation of a company rule. 871 IAC 24.25(4).

The greater weight of the evidence indicates a discharge for attendance, rather than a voluntary quit based on "no-call, no-show" absences. The evidence indicates that Ms. McDaniel had no

intention to be absent without properly notifying the employer and took reasonable steps to notify the employer of her need to be absent due to illness for multiple shifts. The evidence indicates the employer did not take reasonable steps to provide Ms. McDaniel with fair notice of all the provisions of the attendance policy so that Ms. McDaniel could comply with all the provisions of the policy. The evidence indicates that Ms. McDaniel reasonably relied upon statements Ms. Mowery made during the conversation that followed Ms. McDaniel's trip to the emergency room. The evidence indicates that this reasonable reliance was the only reason Ms. McDaniel did not notify the employer each day she was absent.

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). The administrative law judge notes that the employer failed to present testimony from Ms. Mowery to rebut Ms. McDaniel's credible assertions about her conversations with Ms. Mowery.

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 indicates that Ms. McDaniel's failure to notify the employer at least two hours prior to her scheduled start time on the initial day of the absence was attributable to Ms. McDaniel's intention to appear for work and the worsening of her medical condition an hour before the scheduled start of her shift. The evidence indicates that Ms. McDaniel provided the employer with reasonable notice under the circumstances. The administrative law judge concludes the absence was an excused absence under the applicable law. The weight of the evidence further indicates that Ms. McDaniel provided the employer with proper notice of her need to be absent due to illness from subsequent shifts when Ms. Daniel contacted Ms. Mowery after her trip to the emergency room. The administrative law judge concludes that these absences were also excused absences under the applicable law. The evidence fails to establish misconduct.

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

**DECISION:**

The claims representative's August 29, 2007, reference 06, decision is affirmed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs