

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GREGORY W FAETH**  
Claimant

**APPEAL NO. 11A-UI-05894-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY  
CASEY'S GENERAL STORES**  
Employer

**OC: 03/06/11**  
**Claimant: Appellant (2-R)**

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

**STATEMENT OF THE CASE:**

Gregory Faeth filed a timely appeal from the April 25, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 3, 2011. Mr. Faeth participated. Michelle Singleton represented the employer. Exhibits One, Two, Four and Five were received into evidence.

**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: Gregory Faeth was employed by the Casey's in Wapello as a full-time pizza maker from October 2010 until March 4, 2011, when Store Manager Michelle Singleton discharged him from the employment for attendance. The final absence that triggered the discharge occurred on March 3, 2011. On that date, Mr. Faeth was absent due to high blood pressure and problems with changes to his blood pressure medication. Prior to the scheduled start of his shift, Mr. Faeth attempted to contact Ms. Singleton by telephone to notify her of his need to be absent. Mr. Faeth knew Ms. Singleton was not at the store and knew that he had recently been directed to contact her if he needed to be absent. Mr. Faeth called Ms. Singleton at home, was unable to reach her, and left a message indicating he would be absent due to illness. Mr. Faeth also called the Casey's store and left a message with the pizza clerk on duty. Mr. Faeth did not ask to speak with the manager on duty and the pizza clerk on duty did not notify the manager on duty of the call until after it had ended. When Mr. Faeth appeared for work the next day, Ms. Singleton discharged him from the employment for attendance.

The employer was aware that Mr. Faeth was having ongoing problems controlling his blood pressure and was having difficulty with the change to his blood pressure medication. Mr. Faeth had been absent on February 7, 2011 because he had passed out. Mr. Faeth's wife called and spoke with Ms. Singleton prior to the scheduled start of the shift. The employer considered this

acceptable notice. Mr. Faeth was transported to the Emergency Room in Iowa City and was admitted overnight. On February 8, Mr. Faeth left work early due to illness after speaking with the trainer on duty. The trainer had told Mr. Faeth that she was his supervisor and Mr. Faeth relied upon that information. On February 12, 14 and 16, Mr. Faeth was absent due to illness and notified the trainer prior to the scheduled start of his shift. On February 16, Ms. Singleton reprimanded Mr. Faeth for attendance. At that point, Ms. Singleton clarified that Mr. Faeth needed to speak with her, the Store Manager, if he needed to be absent.

## **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 Gamble 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 in the record fails to establish absences that would be unexcused absences under the applicable law. The employer's written attendance policy required that Mr. Faeth notify management prior to the scheduled start of his shift if he needed to be absent. Mr. Faeth complied with the timeliness aspect of the written attendance policy. Mr. Faeth reasonably believed that he was complying with other aspects of the policy as well when he notified the trainer of his absences and when he attempted to communicate directly with Ms. Singleton in connection with the final absence as directed. All of the absences were due to illness.

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

The evidence raises the issue of whether Mr. Faeth has met the work ability and availability requirements of the law since he established his claim for benefits. This matter will be remanded to the Claims Division for adjudication of those issues.

**DECISION:**

The Agency representative's April 25, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged. This matter is remanded to the Claims Division for determination of whether the claimant has been able and available for work since he established his claim.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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