

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE M FOGLE
Claimant

APPEAL NO. 11A-UI-12829-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRAFT PIZZA CO
Employer

**OC: 08/28/11
Claimant: Appellant (2)**

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Michelle Fogle filed a timely appeal from the September 27, 2011, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on October 31, 2011. Ms. Fogle participated. The employer was aware of the hearing, but did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The hearing in this matter was consolidated with the hearing in Appeal Number 11A-UI-12828-JTT.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Fogle was employed as full-time slicer from 2003 until August 31, 2011, when the employer discharged her for attendance. The final incident that triggered the discharge was Ms. Fogle's late arrival on August 20, 2011. Ms. Fogle returned and completed ten more shifts before her supervisor discharged her on August 31 and escorted her from the workplace. Ms. Fogle has previously been approved for intermittent medical leave under the Family and Medical Leave Act. Ms. Fogle suffers from migraine headaches and had provided appropriate documentation to the employer supporting her need to be off work. In order to have the absence covered by FMLA, the employer required that Ms. Fogle fill out a slip when she arrived for work after an absence she wanted covered by FMLA. On August 20, Ms. Fogle was late to work because she had taken a prescription migraine pill at 11:00 p.m. and, because of the effects of the medication, could not awaken in time to appear for work at her 3:18 a.m. start time. When Ms. Fogle arrived late for work, she went directly to the production line and did not complete the necessary form to have the absence covered by FMLA. On August 25 a supervisor contacted Ms. Fogle and asked whether that August 20 absence and another on August 10 should be covered by FMLA. Ms. Fogle had been late to work on August 10 for reasons identical to the late arrival on August 20. On August 25, Ms. Fogle told the employer that both absences should be covered by FMLA. The employer required that Ms. Fogle provide a

doctor's note indicating as much. Ms. Fogle did that on August 26. The employer nonetheless elected to end the employment on August 31.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The employer did not participate in the hearing and thereby did not present any evidence to support the allegation that Ms. Fogle was discharged for misconduct in connection with the employment that would disqualify her for benefits. The evidence in the record fails to establish a current act of misconduct. The evidence indicates that the final incident that triggered the discharge occurred on August 20 and would presumably have come to the employer's attention at that time. The employer waited 11 days to notify Ms. Fogle that she was subject to discharge based on the August 20, 2011 absence and the earlier, similar absence on August 10.

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

DECISION:

The Agency representative's September 27, 2011, reference 03, decision is reversed. The discharge was not based on a current act. 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/kjw