

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA A THIRTYACRE
Claimant

APPEAL NO. 11A-UI-15786-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAGCRAFTPAPERCON II LLC
Employer

OC: 11/13/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 8, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 10, 2012. Claimant participated. Tina Stewart, Human Resources Manager, represented the employer.

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: Barbara Thirtyacre was employed by Bagcraftpapercon II as a full-time packer from October 2010 until November 14, 2011, when the employer discharged her for attendance. Ms. Thirtyacre was assigned the third shift, 10:00 p.m. to 6:00 a.m., Sunday night through Friday morning. Jamie Ames, Third Shift Supervisor, was Ms. Thirtyacre's immediate supervisor. If Ms. Thirtyacre needed to be absent from work the employer's policy required that she notify the shift supervisor at least one hour prior to the start of her shift. The policy appeared in the employee handbook and Ms. Thirtyacre was aware of the policy.

The final absence that triggered the discharge occurred on November 14, 2011. On that day, Ms. Thirtyacre's car collided with a deer when she was two miles into her commute to the workplace. The collision occurred a little after 9:00 p.m. Ms. Thirtyacre had left home with sufficient time to arrive at work on time, barring unforeseen events. Ms. Thirtyacre's car was substantially damaged. Ms. Thirtyacre called Mr. Ames while she was still standing by her car, to let him know that she would be detained while she dealt with law enforcement. Ms. Thirtyacre got a ride home from a neighbor and soon concluded that she needed to be evaluated at a hospital. Ms. Thirtyacre called Mr. Ames while she was enroute to the hospital to let him know what she was doing. Ms. Thirtyacre was diagnosed with pull neck shoulder muscles. The treating doctor provided a muscle relaxer and pain medication. Ms. Thirtyacre finished at the hospital around 3:00 a.m. and promptly notified Mr. Ames that she was not able to report for the rest of her shift.

In making the decision to discharge Ms. Thirtyacre from the employment, the employer considered prior absences dating back to December 2010. Ms. Thirtyacre was absent due to illness properly reported on December 27-29, 2010. In 2011, Ms. Thirtyacre was absent due to illness properly reported on April 25, July 18, October 14, and October 17. Ms. Thirtyacre was absent for personal reasons on May 20 and June 27.

The employer issued warnings for attendance on May 20, July 18 and October 17, 2011.

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 evidence in the record establishes that the final absence that triggered the discharge was an excused absence under the applicable law. The absence was caused by matters beyond Ms. Thirtyacre's control. The absence involved a motor vehicle collision involving a deer, damage to Ms. Thirtyacre's car, and minor injury to Ms. Thirtyacre. Ms. Thirtyacre promptly notified the employer of the accident and continued to provide timely status updates. Ms. Thirtyacre reasonably concluded it was wise to seek medical evaluation. That evaluation determined that she had suffered minor injury and Ms. Thirtyacre was prescribed a muscle relaxer and pain medication. Ms. Thirtyacre reasonably concluded she was not in proper condition to report for work and promptly notified the employer of this.

Because the final absence that triggered the discharge was an excused absence under the applicable law, the evidence fails to establish a current act of misconduct. The discharge would not disqualify Ms. Thirtyacre for benefits. The administrative law judge need not consider the prior absences. In any event, the evidence indicates only two unexcused absences on May 20 and June 27, 2011. The evidence does not establish excessive unexcused absences.

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

DECISION:

The Agency representative's December 8, 2011, reference 01, 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