

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELSEY M JOHNSON
Claimant

APPEAL NO. 12A-UI-03534-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CARGILL MEAT SOLUTIONS
CORPORATION**
Employer

**OC: 02/19/12
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Kelsey Johnson filed a timely appeal from the March 27, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 24, 2012. Ms. Johnson participated personally and was represented by Brian Ulin, Business Representative with United Food & Commercial Workers' Local Number 230. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

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: Kelsey Johnson was employed by Cargill Meat Solutions Corporation as a full-time production worker from March 2011 until February 21, 2012, when the employer discharged her for attendance.

The final absence that triggered the discharge occurred on Friday, February 17, 2012. On that day, Ms. Johnson was scheduled to work at 5:00 a.m. At 4:35 a.m. that morning as Ms. Johnson got in her car with her three-year-old daughter, she discovered that her car battery was dead. Ms. Johnson had no prior reason to expect her car battery to be dead. The employer's absence reporting policy required that Ms. Johnson telephone the designated number at least 30 minutes before her shift if she needed to be absent or late. Ms. Johnson was aware of the policy. Ms. Johnson did not telephone the employer. Ms. Johnson got her vehicle started at 6:25 a.m. Ms. Johnson took her child to daycare and then got to work at 6:40 a.m. Ms. Johnson's next most recent absence had been in October 2011. There had been a medical basis for the earlier absence and Ms. Johnson had provided the employer with a doctor's note.

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).

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The employer did not participate in the hearing and, thereby, failed to present any evidence to support the allegation that Ms. Johnson was discharged for misconduct in connection with the employment. A dead car battery in February is a situation that can occur without warning through no fault of the motorist. There might have been reason to deem the tardiness on February 17 an excused absence, if had Ms. Johnson taken reason steps to alert the employer to her situation. In the absence of any notice to the employer to indicate she would need to appear late for work, the administrative law judge must conclude that the absence was an unexcused absence under the applicable law. The evidence in the record fails to establish any additional unexcused absences. Ms. Johnson's single unexcused absence from her production worker position involved a lack of notice to the employer, but did not involve dishonesty. That single unexcused absence is insufficient to establish 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. Johnson was discharged for no disqualifying reason. Accordingly, Ms. Johnson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Johnson.

DECISION:

The Agency representative's March 27, 2012, 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