

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY K LAUNSDALE

Claimant

APPEAL NO. 07A-UI-06920-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OZARK AUTOMOTIVE DISTRIBUTORS INC

Employer

**OC: 06/17/07 R: 02
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Ozark Automotive Distributors filed a timely appeal from the July 10, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 31, 2007. Claimant Wendy Launsdale participated. Whitney Smith, Human Resources Supervisor, represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One through Ten into evidence.

ISSUE:

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: Wendy Launsdale was employed by Ozark Automotive Distributors/O'Reilly Auto Parts as a full-time inbound materials handler from September 3, 2002 until March 12, 2007, when Whitney Smith, Human Resources Supervisor, discharged her for attendance. Ms. Launsdale's regular hours were 7:00 a.m. to 4:00 p.m., Monday through Friday. The employer also required overtime hours that would require Ms. Launsdale to commence work at 5:00 a.m., work until 5:00 p.m. and/or work Saturday shifts. Ms. Launsdale's immediate supervisor was Receiving Supervisor Terry Moren.

The final attendance incident that prompted the discharge concerned an alleged late arrival on March 10, 2007. In the middle of the workday on Friday, March 9, Mr. Moren announced to the employees that the employer would require the employees to appear at 5:00 a.m. on Saturday, March 10, for overtime work. Mr. Moren made the announcement during a meeting. After the meeting, Ms. Launsdale notified Mr. Moren that it would be difficult for her to find childcare for 5:00 a.m. on a Saturday on such short notice. Mr. Moren agreed to let Ms. Launsdale start at 6:00 a.m. Mr. Moren did not document his approval of the 6:00 a.m. start time. Ms. Launsdale appeared for work at 6:00 a.m. on March 10 and completed her overtime shift. When Ms. Launsdale appeared for work on Monday, March 12, she was summoned to a meeting with

Human Resources Supervisor Whitney Smith and Receiving Supervisor Terry Moren. Ms. Smith notified Ms. Launsdale that she was being discharged for attendance based on her late arrival on March 10 and presented Ms. Launsdale with a reprimand. Ms. Launsdale refused to sign the document and exited the meeting. The meeting lasted approximately two minutes.

The employer considered prior absences in making the decision to discharge Ms. Launsdale for attendance. Ms. Launsdale's next most recent absences had been on February 7 and 8, when Ms. Launsdale was absent due to illness and properly notified her supervisor prior to the start of her shift. On September 19, 2006, Ms. Launsdale left work early with permission to care for a sick child. On September 20, Ms. Launsdale was absent due to her child's illness and properly notified her supervisor prior to the start of her shift. On July 17, Ms. Launsdale was absent due to illness properly reported. On June 14, 2006, Ms. Launsdale was absent because her 16 year old had run away.

The employer had issued warnings to Ms. Launsdale on March 15, 2006, June 14, 2006, August 18, 2006, September 21, 2006, and February 9, 2007, based on the number of "occurrence points" she had accrued.

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). The administrative law judge notes that the employer failed to present testimony from Ms. Launsdale's immediate supervisor, Terry Moren, who was the person in the position to provide the most direct and satisfactory evidence to support the employer's case. Mr. Moren still works for the employer and presumably was available to testify.

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 establishes that Ms. Launsdale's delayed start on Saturday, March 10, had been approved by her immediate supervisor on March 9. Ms. Launsdale had very short notice of the March 10 overtime shift. Ms. Launsdale sought approval for a one-hour delay of her start time, received approval, and reasonably relied upon Mr. Moren's approval of the delayed start time. The administrative law judge concludes that Ms. Launsdale's one hour absence on March 10 was an excused absence under the applicable law. Because the final absence that prompted the discharge was an excused absence, the evidence in the record fails to establish a “current act” of misconduct that might serve as the basis for disqualifying her for unemployment insurance benefits. See 871 IAC 24.32(8). Because the evidence fails to establish a “current act” of misconduct, the administrative law judge need not consider whether Ms. Launsdale's prior absences were excused or unexcused. Nonetheless, the administrative law judge notes that evidence is sufficient to establish only one unexcused absence on June 14, 2006.

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

DECISION:

The claims representative's July 10, 2007, reference 01, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css