

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICOLE SCHLABACH**  
Claimant

**APPEAL NO. 07A-UI-03455-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JELD-WEN INC**  
Employer

**OC: 03/11/07 R: 03  
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:**

Jeld-Wen filed a timely appeal from the March 29, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 19, 2007. Claimant Nicole Schlabach participated. Paul Murphy of TALX UC eXpress represented the employer and presented testimony through Production Manager Troy Dillon. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Employer's Exhibits One, Two and Three 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: Nicole Schlabach was employed by Jeld-Wen as a full-time builder from November 28, 2005 until February 27, 2007, when Production Manager Troy Dillon discharged her for attendance. Ms. Schlabach's regular hours of employment were 7:00 a.m. to 3:00 p.m. The employer's notification policy required Ms. Schlabach to call her supervisor as soon as possible if she needed to be absent. The employer did not specify that the contact needed to come at specific time. Though the employer's "no-fault" attendance policy did not require Ms. Schlabach to provide a reason for the absence, Ms. Schlabach generally provided a reason. The employer did not consistently document the reason Ms. Schlabach provided for her absence.

The final absence that prompted the discharge occurred on February 28, 2007, when Ms. Schlabach was absent because her son was ill. Ms. Schlabach contacted the employer at 7:30 a.m. and left a message that she would be absent. Ms. Schlabach called back later in the day and spoke directly to her immediate supervisor. All of Ms. Schlabach's prior absences were due to her own illness or her children's illness and were properly reported to the employer. The employer discharged Ms. Schlabach because her attendance points under the "no-fault" policy exceeded the allowable number of points.

## 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 Ms. Schlabach's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 evidence in the record establishes that Ms. Schlabach's final absence was due to illness properly reported to the employer. Accordingly, the absence was an excused absence under the applicable law. Because the final absence was excused, the evidence fails to present a "current act" of misconduct upon which a discharge for misconduct must be based. See 871 IAC 24.32(8). Accordingly, the administrative law judge concludes that Ms. Schlabach was discharged for no disqualifying reason. Because there was not "current act" of misconduct, the administrative law judge need not consider Ms. Schlabach's prior absences. Nonetheless, the evidence indicates the prior absences were excused under the applicable law. Ms. Schlabach is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Schlabach.

**DECISION:**

The Agency representative's March 29, 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/pjs