

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**YESENIA I IBARRA**  
Claimant

**APPEAL NO. 06A-UI-09759-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MUSCATINE COUNTY**  
Employer

**OC: 09/03/06 R: 04  
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:**

Muscatine County filed a timely appeal from the September 26, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on October 18, 2006. Claimant Yesenia Ibarra participated. County Treasurer Jerry Coffman represented the employer. The administrative law judge took official notice of Agency administrative records regarding benefits disbursed to the claimant.

**ISSUE:**

Whether Ms. Ibarra 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: Yesenia Ibarra was employed by the Muscatine County Treasurer's office as a full-time Treasury Clerk from May 2004 until September 7, 2006, when County Treasurer Jerry Coffman and First Deputy Treasurer Robin Phillips discharged her for attendance. Mr. Coffman made the decision to discharge Ms. Ibarra and Ms. Phillips executed the discharge.

The final incident that prompted the discharge occurred on September 5, 2006. On that date, Ms. Ibarra left a telephone message for Ms. Phillips at 7:15 a.m., indicating that Ms. Ibarra needed to accompany her child to preschool in the morning and needed to go to a doctor appointment in the early afternoon. Ms. Ibarra indicated in her message that she would come to work after the doctor appointment. Ms. Ibarra had previously requested and received permission to take time away from work for the doctor appointment, but had not been approved for time off to accompany her child to preschool. Upon receiving Ms. Ibarra's telephone message in the morning, Ms. Phillips brought Ms. Ibarra's absence to the attention of County Treasurer Jerry Coffman. The two decided that Ms. Ibarra had requested too many days off from work, had missed too many days of work, and would be discharged from the employment. Ms. Ibarra's doctor appointment was over at 12:45 p.m. Ms. Ibarra's doctor provided her with a medical excuse that excused her from work on Tuesday-Wednesday, September 5-6, due to

pain. Ms. Ibarra immediately notified Ms. Phillips that she would be off work the remainder of September 5 and all of September 6, due to illness. When Ms. Ibarra appeared for work on Thursday, September 7, Ms. Phillips advised Ms. Ibarra that she was discharged from the employment for excessive absences.

The employer does not have a formal or written attendance policy. Instead, employees were instructed to contact First Deputy Robin Phillips if they needed to be absent. There was no directive regarding when the employee must alert Ms. Phillips of the absence. Ms. Ibarra had not been absent any other days in September. Ms. Ibarra had been absent on August 17-18 and 23-25. The absences on August 17 and 18 were for illness properly reported to the employer. The absences on August 23-25 were for vacation that Ms. Ibarra had previously requested and the employer had approved. Ms. Ibarra had not been absent in July.

### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Ms. Ibarra was discharged for misconduct in connection with the employment. It does not.

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 order for Ms. Ibarra'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). A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record establishes that Ms. Ibarra was absent for three reasons on September 5. First, Ms. Ibarra was absent for the doctor appointment. This portion of the absence was for illness properly reported to the employer and, therefore, an excused absence under the applicable law. Second, Ms. Ibarra was absent because she needed to accompany her child to preschool. This absence was for a matter of personal responsibility and Ms. Ibarra had not sought prior approval for the absence. This portion of the absence was unexcused under the applicable law. Finally, Ms. Ibarra was absent for the remainder of the work day after her doctor appointment. This absence was for illness and Ms. Ibarra properly reported it to the employer. In addition, the absence on September 6 was for illness properly reported to the employer. The evidence in the record establishes only the one partial unexcused absence that occurred on September 5, 2006. This single absence did not constitute misconduct for purposes of determining whether Ms. Ibarra is eligible for unemployment insurance benefits. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

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

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 concludes that the employer had the ability to present more direct and satisfactory

evidence through the testimony of Ms. Phillips, but elected not to do so. The administrative law judge infers such additional evidence would have exposed deficiencies in the employer's case.

**DECISION:**

The Agency representative's September 26, 2006, reference 02, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs