

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RAY O SCHLEUNING**  
Claimant

**APPEAL NO. 06A-UI-10060-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CATFISH CHARLIE'S LLC**  
**CATFISH CHARLIE'S**  
Employer

**OC: 09/10/06 R: 12**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Ray Schleuning filed a timely appeal from the October 6, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 29, 2006, at the Dubuque Workforce Development Center. Mr. Schleuning participated. The employer failed to appear for the hearing and did not participate.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits. He was not.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Ray Schleuning was employed by Catfish Charlie's restaurant as a full-time chef for approximately one and a half years until September 8, 2006, when owner Charles Cretsinger discharged him. At the time of the discharge, Mr. Cretsinger told Mr. Schleuning only that Mr. Schleuning was not performing to the employer's expectations and the employer was ending the employment relationship. The conversation was brief and the employer provided no additional information regarding the basis for the discharge. Mr. Schleuning had received no prior reprimands. Two weeks prior to the discharge, Mr. Schleuning had been 10 minutes late for work due to traffic. This had been Mr. Schleuning's only unexcused absence.

Mr. Schleuning had been a salaried employee, worked 70-hour weeks, and was the employer's highest paid employee at the time of the discharge. The timing of the discharge coincided with a seasonal drop in business. Four months prior to the discharge, Mr. Schleuning had taken an approved vacation in connection with the birth of his child. When Mr. Schleuning returned from the vacation, he noted a significant change in the employer's relations with him. After the vacation, the employer took over several administrative duties that had previously been assigned to Mr. Schleuning. Two months prior to the discharge, the employer had had hired another chef at a lower salary.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Schleuning 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 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).

The employer failed to appear for the hearing and, thereby, failed to present any evidence whatsoever to support an allegation of misconduct. 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 evidence in the record establishes one unexcused tardy two weeks before the discharge. However, this act was no longer a "current act" at the time of the discharge. See 871 IAC 24.32(8). In addition, this single unexcused absence would not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). The evidence establishes that the employer discharged Mr. Schleuning based on a general dissatisfaction with employment relationship.

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

#### **DECISION:**

The Agency representative's October 6, 2006, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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