IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

PAULA S VOUGHT
812 AVE C
COUNCIL BLUFFS IA 51503-0643

CON AGRA-COUNCIL BLUFFS
C/O TALX UCM SERV
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-03059-JTT
OC: 02/12/06 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

ConAgra filed a timely appeal from the February 28, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 4, 2006. Claimant Paula Vought participated. Human Resources Generalist Julie Miller represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Paula Vought was employed by ConAgra in Council Bluffs as a full-time sauce cook from October 10, 2001 until February 14, 2006, when Production Supervisor Bob Madsen discharged her for excessive absences. Mr. Madsen had been Ms. Vought's immediate supervisor for approximately one month prior to the discharge. Ms. Vought's shift started at 3:00 a.m.

The final absence that prompted the discharge occurred on February 9, 2006, when Ms. Vought was absent because her seven-year-old daughter was ill. Ms. Vought telephoned Mr. Madsen at 7:00 a.m. to notify him of the absence.

The employer has a written policy that requires employees to telephone a designated number at least one hour prior to the scheduled start of the shift if the employee needs to be absent from the shift. This policy is set forth in an employee handbook. Ms. Vought signed her acknowledgment of receipt of the employee handbook on October 9, 2001. Despite the written policy, Ms. Vought's previous immediate supervisor had instructed employees to contact him personally to advise of an absence and Ms. Vought had followed this policy during the last year of her employment. Mr. Madsen had not indicated a change in this informal notification policy at the time he became Ms. Vought's immediate supervisor. Ms. Vought was following this informal notification policy when she contacted Mr. Madsen on the morning of February 9.

The employer had recorded Ms. Vought as being absent without notifying the employer on January 25, 2006 and February 5, 2006. Prior to January 25, 2006, Ms. Vought had most recently been absent for a reason other than illness properly reported to the employer on February 23, 2005.

On September 26, 2003; July 30, 2004; and March 2, 2005; the employer had disciplined Ms. Vought for poor attendance. It is not clear whether these reprimands were based to any extent on absences for illness properly reported to the employer.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Vought 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).

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. Vought'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 employer was able to provide no meaningful evidence regarding the final absence that prompted the discharge. The employer failed to present testimony from Ms. Vought's immediate supervisor, Bob Madsen. The employer's witness indicated that the employer's documentation of the February 9, 2006 absence had been misplaced and was unavailable for the hearing. The employer presented no evidence to contradict Ms. Vought's assertion that her previous immediate supervisor had deviated from the employer's formal attendance policy and instructed her to contact him directly. The administrative law judge concludes that the employer has failed to present sufficient evidence to prove that Ms. Vought's absence due to illness on February 9, 2006 was improperly reported to the employer. Accordingly, the evidence fails to

indicate a current act of misconduct that might serve as the basis for disqualifying Ms. Vought for benefits. See 871 IAC 24.32(8). Having concluded there was no current act of misconduct, the administrative law judge need not consider whether Ms. Vought's previous absences were unexcused or excessive.

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

DECISION:

The Agency representative's decision dated February 28, 2006, reference 01, 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.

jt/kkf