

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANITA DREESMAN
Claimant

APPEAL NO. 07A-UI-05370-JTT

ADMINISTRATIVE LAW JUDGE

**ELECTROLUX HOME PRODUCTS INC
FRIGIDAIRE**
Employer

OC: 05/14/06 R: 01
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:

Electrolux Home Products/Frigidaire filed a timely appeal from the May 18, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on June 13, 2007. Claimant Anita Dreesman participated. Mallory Russell, Human Resources Generalist, 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, 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: Anita Dreesman was employed by Electrolux Home Products/Frigidaire as an advance operator from May 16, 2005 until April 23, 2007, when the employer discharged her for attendance. Ms. Dreesman's regular work hours were 3:30 p.m. to midnight, Monday through Friday.

The employer has a written attendance policy that is set forth in an employee handbook. The policy required Ms. Dreesman to telephone a designated number at least one hour prior to the scheduled start of her shift if she needed to be absent. Ms. Dreesman was aware of the policy.

The final absence that prompted the discharge occurred on April 16, 2007, when Ms. Dreesman was absent because she and her son were ill and Ms. Dreesman needed to take her son to the doctor. Ms. Dreesman did not call the designated number to report her absence. Instead, at 1:00 p.m., Ms. Dreesman used a different number to reach a security officer and report the absence. Though the employer was aware of the absence on April 16, the employer did not discuss the absence with Ms. Dreesman until April 23, a week later.

The employer considered additional absences in making the decision to discharge Ms. Dreesman. Ms. Dreesman's next most recent absence had been in early November 2006, when Ms. Dreesman had traveled to Hawaii for her mother's funeral and then overstayed an approved leave of absence by one week so that she could spend more time with her family. Ms. Dreesman had been absent due to illness on September 10, 11, and 12, 2006. Ms. Dreesman properly reported the absences on September 10 and 12, but did not report an absence on September 11. When Ms. Dreesman returned to work, she provided her supervisor with a doctor's note that covered all three days. Ms. Dreesman was absent and failed to notify the employer on July 30 and August 6, 2006. The employer recorded additional absences on July 16, August 7 and August 27 and recorded that Ms. Dreesman had reported the absences to the employer. The employer has no additional information regarding these three absences.

The employer issued written warnings for attendance on August 14, 2006, August 31, 2006 and September 13, 2006. When Ms. Dreesman returned to work after exceeding her approved leave of absence in early November, the employer intended to discharge her, but instead entered into an agreement with the union to continue the employment and treat the extra week of leave as part of the approved leave of absence.

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).

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 evidence in the record fails to establish a “current act” of misconduct. See 871 IAC 24.32(8). The employer was aware of the final absence a full week before the employer took any steps to address the absence with Ms. Dreesman. Meanwhile, Ms. Dreesman continued to report for work. The evidence fails to establish any reasonable basis for the employer's delay in following up with Ms. Dreesman. The greater weight of the evidence also indicates that the final absence was due to illness and that Ms. Dreesman took reasonable steps to notify the employer of the final absence more than an hour prior to the start of her shift. Though Ms. Dreesman did not use the designated number, Ms. Dreesman otherwise complied with the notification policy. Because the evidence fails to establish a “current act,” the administrative law judge need not consider the prior absences. However, the administrative law judge notes there was a five-month history of good attendance between the unexcused absence in November and the final absence. Even if the administrative law judge had found the final absence to be unexcused, the preceding five-months of good attendance would have prevented the administrative law judge from finding excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Dreesman was discharged for no disqualifying reason.

Accordingly, Ms. Dreesman is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Dreesman.

DECISION:

The claims representative's May 18, 2007, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs