

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

KATHY J HOXTON
506 HENRY ST
WILLIAMSBURG IA 52361-9516

VICTOR PLASTICS INC
2135 B AVE
VICTOR IA 52347

Appeal Number: 06A-UI-01189-JTT
OC: 01/08/06 R: 03
Claimant: Appellant (2)

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
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Claimant Kathy Hoxton filed a timely appeal from the January 26, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 16, 2005. Ms. Hoxton participated. The employer responded to the hearing notice by providing proposed exhibits for the hearing. The employer waived in writing its participation in the hearing. Exhibits One through Eight were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kathy Hoxton was employed by Victor Plastics as a full-time laborer from July 11, 2005 until January 2, 2006, when “Pam” in Human Resources discharged her for excessive absences.

The final absence that prompted the employer to discharge Ms. Hoxton occurred on December 27, 2005. During the period of December 22 through January 1, Ms. Hoxton was on temporary lay off status. On December 20, the employer posted a sign-up sheet for employees who wished to work during the lay off week. Though Ms. Hoxton signed up to work on December 27, Ms. Hoxton did not appear for work on that day. When Ms. Hoxton appeared for work on January 3, 2006, she discovered that her name was absent from the daily job assignment posting. Ms. Hoxton asked a supervisor why she was not on the posting. The supervisor advised that Ms. Hoxton had been discharged and directed Ms. Hoxton to speak with the Human Resources department, which confirmed the discharge.

Ms. Hoxton's most recent absence had occurred on November 28, when Ms. Hoxton had gone home early due to illness and with the permission of her supervisor. Ms. Hoxton's next most recent absence had been on October 31. The employer had issued written warnings to Ms. Hoxton regarding attendance on September 13 and November 29. The November 29 warning followed the day Ms. Hoxton left work early due to illness with her supervisor's approval.

The employer has a "no-fault" attendance policy and discharges employees once they exceed a certain number of points. Employees may accrue points even for absences due to illness properly reported to the employer.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Hoxton was discharged for misconduct in connection with her employment based on excessive unexcused absences.

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(7) provides:

- (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer bears 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 to 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. Hoxton'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 preponderance of the evidence in the record establishes that Ms. Hoxton did indeed sign up to work on December 27 and then failed to appear for the shift. The employer provided multiple documents bearing Ms. Hoxton's signature. The employer also provided a copy of the sign-up sheet. Upon careful comparison of the signature from the sign-up sheet with the written warnings issued September 13, the administrative law judge concludes that the signature on the sign-up sheet is that of Ms. Hoxton. The administrative law judge concludes that Ms. Hoxton's absence from the December 27, 2005 shift was unexcused. The evidence in the record fails to establish any other absences that would be deemed unexcused for unemployment insurance purposes. Ms. Hoxton's one unexcused absence does not constitute misconduct. 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. Hoxton was discharged for no disqualifying reason. Accordingly, Ms. Hoxton is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The representative's decision dated January 26, 2006, reference 01, is reversed. The claimant was discharged from her employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

jt/pjs