

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIN R MCMAHON
Claimant

APPEAL NO. 08A-UI-03885-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PATTERSON LOGISTICS SERVICES INC
Employer

OC: 03/23/08 R: 02
Claimant: Appellant (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Erin McMahon filed a timely appeal from the April 10, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 6, 2008. Claimant participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Erin McMahon was employed by Patterson Logistics Services in Boone on a full-time basis from February 12, 2003 until March 22, 2008, when Supervisor Don Brown discharged her for attendance. Until January 2008, Ms. McMahon worked in a production position on the second shift. The hours of the second shift were 1:00 p.m. to 10:30 p.m. or 11:00 p.m. Ms. McMahon's supervisor on the second shift was Damien Solverson. In January 2008, the employer transferred Ms. McMahon to a first shift inventory control position after the employer learned of a sexual relationship between Mr. Solverson and Ms. McMahon. Ms. McMahon's participation in the transfer was involuntary. The hours of the first shift were 6:00 a.m. to 2:30 p.m. Ms. McMahon had transportation to her second shift position, but lacked transportation to and from the new first shift position. The employer was aware that Ms. McMahon lacked transportation for the first shift and the employer arranged for another employee, Andy Holien, to provide transportation to Ms. McMahon. Mr. Holien was frequently late picking up Ms. McMahon for work, which resulted in Ms. McMahon being frequently tardy.

The final absence that triggered the discharge occurred on March 22, 2008. Ms. McMahon had worked another job the night before. Ms. McMahon had awakened at the appropriate hour and had prepared to go for work. Ms. McMahon had dozed off while she was waiting for Mr. Holien. It is unclear whether Mr. Holien ever arrived at Ms. McMahon's home to pick her up for work.

Ms. McMahon contacted Supervisor Don Brown at 6:10 a.m. to explain her tardiness. Mr. Brown told Ms. McMahon that she was discharged from the employment.

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). 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).

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 notes that the employer has failed to appear for the hearing and, thereby, has failed to present any evidence whatsoever to support the allegation that Ms. McMahon was discharged for misconduct. The evidence in the record fails to establish, by a preponderance of the evidence, that Ms. McMahon's final incident of tardiness on March 22, 2008 should be deemed an unexcused absence. The evidence indicates that the employer had made arrangements to provide Ms. McMahon transportation to and from the employment. The evidence indicates that the employer entered into this arrangement after the employer learned that one of its supervisors had engaged in a sexual relationship with Ms. McMahon. The employer has the burden of proof in this matter, not Ms. McMahon. The employer failed to produce any evidence to show that Mr. Holien went to Ms. McMahon's house on March 22 to pick her up for work. The administrative law judge concludes that the employer has produced insufficient evidence to establish a final unexcused absence. Accordingly, the evidence fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider the prior attendance matters and whether they were excused or unexcused absences. See 871 IAC 24.32(8). Ms. McMahon is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. McMahon.

DECISION:

The Agency representative's April 10, 2008, reference 01, decision is reversed. 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/kjw