

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEE ETTA R FISHER
Claimant

APPEAL NO. 06A-UI-10494-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 01/08/06 R: 03
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:

Dee Etta Fisher filed a timely appeal from the October 25, 2006, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on November 13, 2006. Claimant was not available at the telephone number she had provided for the hearing and did not participate. General Supervisor Jerome Rincken represented the employer.

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: Dee Etta Fisher was employed by Tyson Fresh Meats as a full-time production worker from February 14, 2006 until October 4, 2006, when Personnel Manager Randy Schultz and Ms. Fisher's immediate supervisor suspended her for attendance. The employer discharged Ms. Fisher the next day. The final absence that prompted the discharge occurred on October 2, 2006, when Ms. Fisher was absent due to illness and properly notified the employer. The employer has a written attendance policy that required Ms. Fisher to notify the employer at a designated telephone number at 30 minutes prior to the scheduled start of her shift if she needed to be absent.

Ms. Fisher's absences during the days leading up to her discharge were as follows. On September 21, Ms. Fisher notified the employer she would be late for work and then failed to appear. On September 22, Ms. Fisher was absent due to illness and properly notified the employer. On September 27, Ms. Fisher was absent due to illness, but called in late. On September 28 and 29, Ms. Fisher was absent 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. Fisher 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.

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). The employer's witness did not participate in the decision to discharge the claimant or the conferences that preceded and led to the decision to discharge Ms. Fisher. The employer's witness testified that the final absence that prompted the discharge occurred on September 21. This assertion is contradicted by information contained in the

employer's initial protest of the claim for benefits, and attached attendance records, which both indicate October 2 as the final absence prompting the discharge.

In order for Ms. Fisher'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 evidence in the record establishes that the final incident that prompted the discharge occurred on October 2, 2006, when Ms. Fisher was absent due to illness properly reported to the employer. The absence was an excused absence under the applicable law. The evidence further indicates that the two absences immediately preceding the final absence were also absences for illness properly reported and, therefore, excused absences. Because the final absence that prompted the discharge was an excused absence, the evidence in the record fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Fisher for benefits. See 871 IAC 24.32(8). In the absence of a "current act" of misconduct, the administrative law judge need not further consider Ms. Fisher's prior absences and whether they would be excused or unexcused under the applicable law. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Fisher was discharged for no disqualifying reason. Accordingly, Ms. Fisher is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Fisher.

DECISION:

The Agency representative's October 25, 2006, reference 02, 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