

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH L CARGIN
Claimant

APPEAL NO. 07A-UI-11026-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BODEANS BAKING HOLDING
COMPANY LLC**
Employer

**OC: 10/28/07 R: 01
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

BoDeans Baking Holding Company filed a timely appeal from the November 20, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 13, 2007. Claimant Sarah Cargin did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Darla Weiler, Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence.

ISSUES:

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

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sarah Cargin was employed by BoDeans Baking Holding Company as a full-time packer from April 30, 2007 until October 29, 2007, when Darla Weiler, Human Resources Manager, and Larry Tomasiello, General Manager, discharged her for attendance.

The final absence that prompted the discharge occurred on October 26, 2007, when Ms. Cargin was 20 minutes tardy for personal reasons. Ms. Cargin was also tardy for personal reasons on May 25 and 21, June 19, August 7, 9, 17, 25, 28 and October 5. On September 27, Ms. Cargin left work early due to illness and properly notified the employer.

On August 13, Larry Tomasiello, General Manager, had issued a written warning to Ms. Cargin, based on attendance issues. The warning told Ms. Cargin that she could not miss any work in

the subsequent 90 days. The August 13 warning was based on two instances of tardiness and other absence(s).

Ms. Cargin established a claim for benefits that was effective October 28, 2007, and received benefits totaling \$358.00.

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 establishes that the final absence, the tardiness on October 26, was an unexcused absence under the applicable law. The evidence indicates several additional instances of tardiness, with the next most recent incident occurring on October 5. The evidence establishes excessive unexcused tardiness.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cargin was discharged for misconduct. Accordingly, Ms. Cargin is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Cargin.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Cargin received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Cargin must repay to Iowa Workforce Development. Ms. Cargin is overpaid \$358.00.

DECISION:

The Agency representative's November 20, 2007, reference 01 decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$358.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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