IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN E PATTERSON
Claimant

CMC STEEL FABRICATORS INC
SMI JOIST COMPANY
Employer

APPEAL NO. 07A-UI-01402-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/24/06 R: 02
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:

CMC Steel Fabricators Inc./SMI Joist Company filed a timely appeal from the February 2, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 26, 2007. Claimant John Patterson did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Mandy Mott, Benefits Coordinator, represented the employer. The administrative law judge took official notice of the Agency's record of payments to the claimant and received Employer's Exhibit One into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: John Patterson was employed by CMC Steel Fabricators Inc./SMI Joist Company as a full-time welder from April 9, 2006 until January 8, 2007, when General Manager Tim Wendel discharged him for attendance. Mr. Patterson was assigned to the third shift, 9:30 p.m. to 5:30 a.m. Mr. Patterson's immediate supervisor was Robbie Kromminga.

The employer has a written attendance policy. Mr. Patterson was aware of the attendance policy. Under the policy, the employer requested at least two hours' notice of an absence, but required notice prior to the start of a shift.

The final absence that prompted the discharge occurred on January 8, 2007, when Mr. Patterson left work early to check on his infant son, who was experiencing breathing difficulties. The employer believes the child may suffer from a respiratory ailment. Mr. Patterson sought and received permission from Supervisor Robbie Kromminga. Mr. Kromminga told Mr. Patterson that if he came back to complete his shift, Mr. Kromminga

would not turn in a "leave early slip," but that if he did not return Mr. Kromminga would turn in the slip. Mr. Patterson said he would come back if his son started breathing normally again. Mr. Patterson did not return to complete his shift. Mr. Kromminga continues in the employer's employ, but did not testify.

Mr. Patterson had prior absences and had received prior warnings for attendance. Mr. Patterson's next most recent absence had been on November 21, when he was absent due to illness and notified the employer 30 minutes prior to his shift. The next most recent absence had been on September 22, when Mr. Patterson was absent to illness and again notified the employer 30 minutes prior to his shift. The next most recent absences had been on August 21 and 22, when Mr. Patterson was absent due to an injury. Mr. Patterson notified the employer at 7:30 p.m. that he would be absent for his shifts on August 21 and 22. On August 21, Mr. Patterson also provided the employer an excuse from his chiropractor indicating that he would be unable to work those two days. Mr. Patterson returned to work the following day. On August 8, Mr. Patterson was absent due to back pain, but failed to notify the employer. On July 24, Mr. Patterson left work early due to illness and properly notified a supervisor before leaving. On July 17, Mr. Patterson was tardy for personal reasons. On June 26, Mr. Patterson was absent due to an injury and notified the employer at 5:00 p.m. that he would be absent for his 9:30 p.m. shift.

On December 1, the employer issued a written warning that notified Mr. Patterson that further absences or safety issues would result in discharge from the employment. The employer issued additional warnings on September 26 and November 21 in connection with the absences referenced above.

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).

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 Mr. Patterson's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 greater weight of the evidence in the record establishes that the final absence on January 8 was due to the illness of Mr. Patterson's infant son that required Mr. Patterson's immediate attention. The absence was an excused absence under the applicable law. Because the final absence was an excused absence under the applicable law, the evidence in the record fails to establish the necessary "current act" upon which a disqualification for benefits must be based. See 871 IAC 24.32(8). Accordingly, the administrative law judge concludes that Mr. Patterson was discharged for no disqualifying reason. Mr. Patterson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

Because the evidence fails to establish a "current act," the administrative law judge need not consider the prior absences. See 871 IAC 24.32(8). However, the evidence indicates that the prior unexcused absences were not, in fact, excessive. The evidence indicates that Mr. Patterson's absences on June 26, July 24, August 21-22, September 22 and November 21 were all for illness properly reported to the employer and, accordingly, excused absences under the applicable law. The evidence indicates that the tardiness on July 17 was unexcused. The

evidence indicates that Mr. Patterson's absence on August 8 was an unexcused absence under the applicable law because Mr. Patterson failed to properly notify the employer.

DECISION:

The Agency representative's February 2, 2007, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw