

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LONNA R POTTER

Claimant

APPEAL NO. 08A-UI-05682-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY

Employer

**OC: 01/27/08 R: 02
Claimant: Respondent (1-R)**

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

STATEMENT OF THE CASE:

Swift & Company filed a timely appeal from the June 11, 2008, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on July 7, 2008. Claimant Lonna Potter did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Human Resources Representative Aaron Vawter 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 through Six into evidence.

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: Lonna Potter was employed by Swift & Company as a full-time production worker from October 10, 2007 until May 1, 2008, when Human Resources Coordinator Aaron Vawter discharged her for attendance. Ms. Potter was assigned to the second shift. Ms. Potter's start time was 3:30 to 3:40 p.m. Ms. Potter worked Monday through Friday and performed occasional Saturday work.

The employer has a written attendance policy set forth in an employee handbook. Ms. Potter was aware of the policy. The policy required employees to telephone the number on the back of their ID badge at least 30 minutes before the scheduled start of their shift to notify the employer of an absence. The employee would generally leave a message at the designated number.

The final absence that prompted the discharge occurred on May 1, 2008, when Ms. Potter was absent due to illness related to pregnancy. The weight of the evidence indicates that Ms. Potter notified the employer at least 30 minutes prior to the start of her shift. Ms. Potter had been absent due to her daughter's illness on April 30, 2008 and had notified the employer in a timely fashion by leaving a recorded message. Ms. Potter had been absent on April 21, 2008 because she had been assaulted by her significant other. Ms. Potter notified the employer in a timely fashion and spoke directly with Human Resources Coordinator Aaron Vawter.

On March 18, 2008, Mr. Vawter had placed Ms. Potter on a 90-day probation contract regarding attendance. The probation contract was based on the fact that Ms. Potter had accrued three unexcused absences in the preceding 12-month period. The probation contract indicated that any further absences during the probation period would result in discharge from the employment. Mr. Vawter discussed the probation with Ms. Potter, but Ms. Potter did not receive a copy of the probation contract. Ms. Potter signed her acknowledgment of the probation contract. Mr. Vawter told Ms. Potter that she would be required to speak directly to a human resources representative if she needed to be sick.

Ms. Potter's absences prior to imposition of the 90-day probation contract were as follows: On October 30, 2007, Ms. Potter was absent due to illness properly reported to the employer. On November 16 and December 7, 2007, Ms. Potter went home early due to illness and sought permission from the employer prior to leaving. On December 24, 2007 and January 25, 2008, Ms. Potter was tardy for personal reasons. On February 18, 2008, Ms. Potter went home early due to illness and sought permission from the employer prior to leaving. On February 21, Ms. Potter was tardy for personal reasons. On February 27, Ms. Potter went home early due to illness and sought permission from the employer prior to leaving. Mr. Vawter reminded Ms. Potter of the employer's expectation that she would provide the employer with medical documentation to support her need to leave work early if she had left work early due to illness more than twice during the preceding 12-month period. On March 12 and 13, Ms. Potter was absent due to illness properly reported to the employer. On March 14 and 17, Ms. Potter was absent because she lacked proper child care.

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 weight of the evidence in the record indicates that the final absence was due to illness, was reported to the employer in a timely fashion, but was not reported to the employer pursuant to terms of the reprimand Mr. Vawter had issued on March 18, 2008. Ms. Potter's failure to speak directly with a human resources representative made the May 1 absence an unexcused absence. The weight of the evidence indicates that the April 30 absence was an unexcused absence for the same reason. Had Ms. Potter not been subject to the 90-day probation contract, both absences would have been properly reported and, accordingly, would have been excused absences under the applicable law. The April 21 absence was for illness properly reported and was, therefore, an excused absence. The evidence indicates unexcused absences on December 24, January 25, and February 21, when Ms. Potter was tardy for personal reasons. The evidence indicates unexcused absences on March 14 and 17, when Ms. Potter was absent because she lacked proper child care. The remaining absences were for illness properly reported and were excused absences under the applicable law.

The evidence indicates that Ms. Potter made a reasonable effort to notify the employer of her final two absences on April 30 and May 1. The evidence indicates that Ms. Potter had received only one formal, written reprimand for attendance, the 90-day probation contract. The administrative law judge notes that the written probation contract says nothing about calling the employer and speaking directly with a human resources representative. The evidence indicates that one has to go back to March 17 to find an absence that was based on something other than illness. Under the particular

circumstances of this case, the administrative law judge concludes that Ms. Potter's unexcused absences were not excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Potter was discharged for no disqualifying reason. Accordingly, Ms. Potter is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Potter.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Ms. Potter's absence from the hearing, coupled with the evidence in the record, raises the question of whether Ms. Potter is able to work and available for work. This matter will be remanded to the Claims Division for investigation of those issues.

DECISION:

The Agency representative's June 11, 2008, reference 04, decision is affirmed. 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.

This matter is remanded to the Claims Division for investigation of whether the claimant has been able to work and available for work since establishing her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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