

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JESSICA A FUNK**  
Claimant

**APPEAL NO. 07A-UI-06722-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STEVES ACE HARDWARE INC**  
**STEVES ACE HARDWARE**  
Employer

**OC: 06/10/07 R: 04**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Jessica Funk filed a timely appeal from the June 28, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 16, 2007. Ms. Funk did not appear for the hearing or request a postponement of the hearing. Steve Selchert, President, represented the employer and presented additional testimony through Phil Roth, General Manager. Exhibits One and Two were received into evidence.

**ISSUES:**

Whether the claimant quit or was discharged from the employment. The administrative law judge concludes that the claimant was discharged.

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Funk was employed by Steve's Ace Hardware as a full-time store manager until June 11, 2007. Ms. Funk had commenced her employment in January 1995 and had become a store manager in February 2004. On Friday, June 8, Steve Selchert, President, notified Ms. Funk that she was being demoted to paint department manager and transferred to another store. Ms. Funk's hourly wage was to be reduced from \$13.40 to \$11.00 per hour in connection with the demotion. The employer demoted Ms. Funk because her personal problems interfered with her ability to effectively manage the employer's store and because Ms. Funk had consistently failed to work the minimum 45 hours per week the employer required of its managers. On June 8, 2007, Mr. Selchert directed Ms. Funk to appear at the employer's other store at 8:30 a.m. on June 11. At 8:40 a.m. on June 11, Ms. Funk notified Mr. Selchert that she could not appear for work because she lacked childcare for her nine-year-old child. Mr. Selchert told Ms. Funk that if she did not appear for work, the employer would deem her actions a quit. Ms. Funk did not appear for work and had no further contact with the employer.

In January 2007, Mr. Selchert and General Manager Phil Roth met with the employer's managers to discuss concerns about store operations and the need for managers to work the requisite minimum 45 hours per week. While several managers were present, the discussion was primarily directed at Ms. Funk, who the employer believed had been neglecting her duties as store manager.

As store manager, Ms. Funk made out the work schedule for her store. The employer expected Ms. Funk to work the schedule she prepared for herself, but Ms. Funk frequently did not do so. The employer was concerned about how Ms. Funk would be able to discipline other employees for attendance matters in light of her own attendance matters. In January 2007, Ms. Funk recorded that she had come in late twice and left early once. In February 2007, Ms. Funk recorded that she came in late four times and left early once. In March 2007, Ms. Funk recorded that she came in late three times and left early four times. In April 2007, Ms. Funk recorded that she came in late eight times and left early two times. In May 2007, Ms. Funk recorded that she came in late 13 times, did not appear at all for three scheduled shifts, and left early twice. These absences were for personal matters. From January 1 to May 31, 2007, Ms. Funk worked her minimum 45 hours per week schedule only once.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first question is whether Ms. Funk voluntarily quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The greater weight of the evidence indicates that the employer initiated the separation from the employment by giving Ms. Funk the ultimatum of appearing for work on June 11 or separating from the employment. The evidence fails to indicate that Ms. Funk evidenced an intention to sever the employment relationship during her conversation with Mr. Selchert on June 11. The greater weight of the evidence indicates that Ms. Funk was discharged by the employer and did not voluntarily quit.

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 that prompted the discharge was for a matter of personal responsibility and, therefore, was an unexcused absence under the applicable law. The evidence indicates that this final unexcused absence followed a consistent pattern of unexcused absences over the course of several months. The evidence indicates excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Funk was discharged for misconduct. Accordingly, Ms. Funk 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. Funk.

**DECISION:**

The claims representative's June 28, 2007, reference 01, decision is affirmed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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