

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICA K BIRTCHER
Claimant

APPEAL NO. 08A-UI-02747-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NPC INTERNATIONAL INC
PIZZA HUT**
Employer

**OC: 02/10/08 R: 03
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

NPC International, Inc., doing business as Pizza Hut, filed a timely appeal from the March 10, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 3, 2008. Claimant Jessica Birtcher did not participate. Ms. Birtcher provided a telephone number for the hearing, 319-471-6170, but was not available at that number at the scheduled start of the hearing. Ms. Birtcher did not respond to two voice mail messages the administrative law judge left for her at the number she had provided. Robert Krاندall represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

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: Jessica Birtcher was employed by Pizza Hut as a part-time cook from November 2006 until February 8, 2008, when Assistant Manager Adam Springsteen discharged her for attendance. The final absence that prompted the discharge occurred on February 7, 2008, when Ms. Birtcher was absent and failed to notify the employer. The employer's attendance policy required Ms. Birtcher to notify a manager on duty at least two hours before the scheduled start of her shift if she needed to be absent from work. Ms. Birtcher was aware of the policy. Mr. Springsteen discharged Ms. Birtcher when she appeared for her shift on February 8, 2008. Ms. Birtcher had been also been tardy for personal reasons on November 29, December 13 and December 20.

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).

The weight of the evidence in the record indicates that Ms. Bircher's final absence on February 7, 2008 was an unexcused absence. The weight of the evidence indicates that Ms. Bircher's instances of tardiness on November 29, December 13, and December 20 were also unexcused absences. However, the evidence indicates a seven-week gap between the final absence and the next most recent absence. The administrative law judge concludes under the particular circumstances in evidence that the 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. Birtcher was discharged for no disqualifying reason. Accordingly, Ms. Birtcher is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Birtcher.

DECISION:

The Agency representative's March 10, 2008, reference 01, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw