

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIFFANY N WILBURN
Claimant

APPEAL NO. 09O-UI-15906-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOME DEPOT USA INC
Employer

**Original Claim: 07/26/09
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge upon the Employment Appeal Board's remand for a new hearing. The employer had filed a timely appeal from the August 25, 2009, reference 01, decision that allowed benefits. After due notice was issued, a new hearing was held on November 30, 2009. Claimant Tiffany Wilburn participated. Scott Anderson, Store Manager, represented the employer.

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: Tiffany Wilburn was employed by Home Depot as a full-time cashier. Ms. Wilburn started the employment in July 2008 and last performed work for the employer on July 21, 2009. Ms. Wilburn was next scheduled to work on July 24, 25, and 26. On July 21, Ms. Wilburn was transported to the University of Iowa Hospitals & Clinics and hospitalized in connection with an abscess in her throat. As of July 25, Ms. Wilburn was again up and about and was able to talk. On that day, Ms. Wilburn telephoned the workplace and spoke with Assistant Manager Chris Walsh. Ms. Wilburn told Mr. Walsh she had been in the hospital and needed to send someone to collect her check. Mr. Walsh told Ms. Wilburn to write a letter authorizing the person to collect the check. Mr. Walsh told Ms. Wilburn she would have to present a medical excuse when she returned to work. Ms. Wilburn assumed she needed to make no further contact with the employer until she was ready to return to work. Ms. Wilburn was aware that the employer's policy required that she notify the employer before the start of her shift if she needed to be absent. Ms. Wilburn was on the schedule to work the following week.

On July 29, the employer sent a letter to Ms. Wilburn's residence by certified mail. The letter said that she had not reported for work and that the employer had tried to reach her by telephone. The Postal Service attempted delivery three times, but then returned the letter to the employer at the end of August.

Ms. Wilburn was discharged from the hospital on August 3. Ms. Wilburn contacted the workplace to notify the employer she was ready to return to work and to inquire about a return to work date. Ms. Wilburn spoke with Mr. Walsh, who told Ms. Wilburn she had been discharged from the employment. Mr. Walsh is still with the employer, but did not participate in the appeal hearing.

After Ms. Wilburn separated from the employer, she returned to her native state, Michigan.

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 indicates that Ms. Wilburn was absent due to illness beginning with her shift on July 24, 2009 and ending with her discharge from the hospital on August 3, 2009. The July 24 absence would not constitute an unexcused absence, because Ms. Wilburn was physically unable to notify the employer of the absence. The weight of the evidence indicates that Ms. Wilburn contacted the employer on July 25 for the purpose of making arrangements to collect her check, but also discussed the absence with Assistant Manager Chris Walsh at that time. The weight of the evidence indicates that the July 25 absence should also be deemed an excused absence. The weight of the evidence indicates that Ms. Wilburn erroneously and unreasonably assumed she need make no further contact with the employer until she was ready to return to work. As of July 25, the employer would have had no way of knowing that Ms. Wilburn would continue to be hospitalized and unable to return to work until after August 3. But, the employer would still need to ensure coverage of Ms. Wilburn's missed shifts. The only way for the employer to know whether Ms. Wilburn had been discharged from the hospital and was able to return to work was if Ms. Wilburn provided that information. The weight of the evidence indicates that Mr. Walsh never told Ms. Wilburn on July 25 that she need not make further contact with the employer until she was ready to return to work. Ms. Wilburn's absences from her shift on July 26 and absence from all of her shifts during the week that followed were unexcused absences. During these days, Ms. Wilburn had the ability to notify the employer of the need to be absent—in keeping with the employer's policy—but did not contact the employer.

In the absence of testimony from Mr. Walsh to establish otherwise, the weight of the evidence indicates that Ms. Wilburn did make contact with Mr. Walsh on August 3 and that he did notify her at that time that she was discharged from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wilburn was discharged for misconduct based on excessive unexcused absences. Accordingly, Ms. Wilburn 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. Wilburn.

DECISION:

The Agency representative's August 25, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw