

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VALERIE A WASSON**  
Claimant

**APPEAL NO. 07A-UI-10407-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VAC LAB EGGS INC/VALO-EIER GMBL**  
**HY-VAC**  
Employer

**OC: 10/07/07 R: 02**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Valerie Wasson filed a timely appeal from the October 31, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 28, 2007. Ms. Wasson participated. Tabitha Tingwald, Processing Manager, represented the employer.

**ISSUE:**

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: Valerie Wasson was employed by Hy-Vac Lab Eggs, Inc., as a full-time Processing Tech from June 1, 2004 until September 11, 2007, when Processing Manager Tabitha Tingwald discharged her for attendance. The final absence that prompted the discharge occurred on September 11, 2007, when Ms. Wasson was tardy to work because she overslept.

The employer has a written attendance policy that is set forth in an employee handbook. Ms. Wasson received a copy of the handbook and was aware of the written attendance policy. The attendance policy required Ms. Wasson to contact the employer at least one hour prior to the scheduled start of her shift if she needed to be absent. Ms. Wasson's shift started at 7:30 a.m., Monday through Friday.

The employer considered prior attendance matters in making the decision to discharge Ms. Wasson. Ms. Wasson was absent on August 20 and 21, and September 5, 2007. However, each absence was for illness properly reported to the employer. Ms. Wasson was tardy due to transportation issues on August 6 and 7, 2007. Ms. Wasson was absent on August 1, 2007 for personal reasons and properly notified the employer. Ms. Wasson left work early with approval on July 23, 2007 to see a chiropractor in response to an acute problem with her back. On July 19, 2007, Ms. Wasson was tardy due to transportation issues. On July 18, 2007, Ms. Wasson was absent due to illness properly reported.

On May 24, 2007, Ms. Wasson was absent due to illness, but did not properly notify the employer. Ms. Wasson initially contacted Ms. Tingwald at 7:06 a.m. and said she would be late because she was not feeling well. Ms. Wasson continued to be ill and eventually went back to sleep. When Ms. Wasson did not appear, Ms. Tingwald called Ms. Wasson's home and spoke with Ms. Wasson's roommate. The roommate advised Ms. Tingwald that Ms. Wasson was sleeping, would not be into work, and told the employer that he was not going to wake Ms. Wasson. Ms. Tingwald advised the roommate that Ms. Wasson had not properly notified the employer she would be absent. Ms. Wasson was aware of the employer's call and aware that the employer wanted to hear from her, but did not make further contact with Ms. Tingwald that day.

Prior to the absence on May 24, Ms. Wasson's next most recent absence had been on May 31, 2006.

When Ms. Wasson returned to work after the May 24, 2007 absence, Ms. Tingwald issued a reprimand and suspended Ms. Wasson for three days. The employer had issued a prior written warning for attendance on August 25, 2006 and had issued verbal warnings for attendance on July 12, 2005 and May 31, 2006 and August 25, 2006.

#### **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 evidence in the record establishes that the final absence on September 11, 2007, was for tardiness and, therefore, was an unexcused absence under the applicable law. The evidence establishes additional unexcused absences on July 19, August 1, 6 and 7. The greater weight of the evidence indicates that the May 24, 2007 absence was an unexcused absence because it was not properly reported. The rest of the 2007 absences were for illness properly reported and, therefore, excused absences under the applicable law. The evidence indicates that Ms. Wasson received repeated warnings for attendance and that the most recent warning involved a three-day suspension. The severity of that disciplinary action would have communicated to a reasonable person that her employment was in jeopardy. The administrative law judge concludes that the evidence establishes excessive unexcused absences.

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

**DECISION:**

The claims representative's October 31, 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 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs