

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA ACEVEDO

Claimant

APPEAL NO. 11A-UI-08302-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC

Employer

OC: 05/22/11

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Angela Acevedo filed a timely appeal from the June 15, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 18, 2011. Ms. Acevedo participated. Human Resources Generalist Nikki Bruno represented the employer and presented additional testimony through Human Resources Generalist Sarah Schneider.

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: Angela Acevedo was employed by West Liberty Foods as a full-time, third-shift head cook from 2008 until May 24, 2011, when Human Resources Generalist Nikki Bruno discharged her for attendance. Ms. Acevedo's work hours were 9:30 p.m. to 6:00 a.m. Ms. Acevedo's immediate supervisor was First Shift Supervisor Brian Ralston.

The final incidents that triggered the discharge occurred during Ms. Acevedo's overnight shift on May 19, 2011. Early in the shift, a security officer radioed Ms. Acevedo that her car was being repossessed in the employer's parking lot and that she was needed outside the building. The security officer had contacted Ms. Acevedo at the direction of Second Shift Supervisor Beau Bolker. Ms. Acevedo reported to the security station, where Mr. Bolker was waiting. Mr. Bolker told Ms. Acevedo to "take care of what you have to." Ms. Acevedo went to the employer's parking lot and retrieved her personal items from her car before it was taken away. Ms. Acevedo returned with 10 minutes. When Ms. Acevedo returned, Third Shift Supervisor Carla Roser documented her return time and asked what was going on. Ms. Acevedo explained the situation. Ms. Acevedo was distraught by the experience of having her car repossessed. Ms. Roser told Ms. Acevedo to let her know if she needed to go. Ms. Ralston asked her if she needed to leave. Ms. Acevedo continued to be distraught and was concerned that she would not be able to perform her food production duties correctly. U.S.D.A. inspectors monitor the food production process and Ms. Acevedo was concerned that she might make an error that

could affect food safety and attract the attention of the U.S.D.A. inspector. Ms. Acevedo asked Ms. Roser if would okay if she left for the evening. Ms. Roser said that would be okay. This conversation occurred in the presence of Mr. Bolker. Ms. Acevedo left early at 11:14 p.m.

In making the decision to discharge Ms. Acevedo from the employment, the employer considered prior absences and reprimands for attendance. If Ms. Acevedo needed to be absent from a shift, she was required to notify the security guard station prior to the scheduled start of her shift. Ms. Acevedo was aware of this.

The employer considered absences going back to May 22, 2010. On May 22, and 24, 2010, Ms. Acevedo was absent so that she could travel to Chicago and be with her aunt as the aunt underwent heart bypass surgery. Ms. Acevedo properly reported these absences to the employer. On November 7, 2010, Ms. Acevedo was late to work but provided proper notice. Neither Ms. Acevedo nor the employer is able to recall the basis for the late start. On December 6, and 7, 2010, Ms. Acevedo was absent so that she could take her sister to Davenport, where the sister's newborn was hospitalized with a serious heart issue. Ms. Acevedo's sister lacked another means of getting to Davenport. On December 9, 2010, Ms. Acevedo was absent due to illness and properly notified the employer. On January 6, 2011, Ms. Acevedo left work early due to illness and properly reported her need to leave to a supervisor. On January 28, 2011, Ms. Acevedo was late to work because she was stopped by law enforcement for speeding. On March 9, 2011, Ms. Acevedo left work early and provided proper notice to the employer. Neither Ms. Acevedo nor the employer can recall why Ms. Acevedo left work early. On March 28, 29, and April 1, 2011, Ms. Acevedo was absent due to illness and properly notified the employer.

The employer had issued notices to Ms. Acevedo during the employment to let her know where she stood on the attendance point system. The employer issued such notices in September 2009, October 2010, March 2011, and April 2011.

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 establishes an unexcused absence on May 19, 2011. The situation Ms. Acevedo faced on that day concerned a matter of personal responsibility, paying her bills. Ms. Acevedo's need to take a brief break from work to retrieve her personal belongings from her car in the employer's parking lot would not rise to the level of an absence. Ms. Acevedo's late decision to leave work early that day had everything to do with a matter of personal responsibility. For that reason, the absence would be an unexcused absence under the applicable law.

The evidence establishes additional unexcused absences on May 22 and 24, 2010, and January 28, 2011. The May 2010 absences were due to Ms. Acevedo's desire to be with her

family as her aunt underwent surgery, but the mere desire to be with a non-immediate family member would not make the absence an excused absence under the applicable law. The January 2011 absence was unexcused because it involved a traffic violation, a matter of personal responsibility over which Ms. Acevedo had control.

The employer had presented insufficient evidence to establish an unexcused absence on November 7, 2010, when Ms. Acevedo was late but gave proper notice. The employer failed to prove the absence was unexcused under the law. Likewise the employer failed to prove that the early departure with proper notice on March 9, 2011, was unexcused under the law.

The evidence establishes excused absences on December 6 and 7, 2010, when it was *necessary* for Ms. Acevedo to be absent from work to transport her sister to the hospital in Davenport, because Ms. Acevedo sister lacked another means to get there. Ms. Acevedo provided proper notice on both dates.

The evidence establishes excused absences on December 9, 2010, as well as January 6, March 28, and 29, and April 1, 2011, on which days Ms. Acevedo was absent due to illness and properly notified the employer.

Thus, we have a final unexcused absence on May 19, 2011, along with additional unexcused absences on May 22, and 24, 2010, and January 28, 2011. Though the May 2010 and May 2011 absences were unexcused under the law, the administrative law judge cannot disregard the attending mitigating circumstances of those absences. In the first instance, Ms. Acevedo desired to be with a extended family member at the time of an important surgical procedure. In the final instance, Ms. Acevedo left early because she was upset and was afraid she would not perform her duties properly. The administrative law judge concludes that Ms. Acevedo'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. Acevedo was discharged for no disqualifying reason. Accordingly, Ms. Acevedo is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Acevedo.

DECISION:

The Agency representative's June 15, 2011, reference 01, decision is reversed. 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