

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROL A SAWVEL
Claimant

APPEAL NO. 07A-UI-05293-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CAPTIVE AIRE SYSTEMS INC
Employer

**OC: 03/04/07 R: 04
Claimant: Appellant (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Carol Sawvel filed a timely appeal from the May 18, 2007, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on July 23, 2007, at the Decorah Workforce Development Center. Ms. Sawvel participated. The employer did not appear for the hearing or request a postponement.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Carol Sawvel was employed by Captive Aire Systems as a full-time panels department production worker from August 13, 2003 until April 30, 2007, when Plant Manager Jeff Fehls discharged her for attendance. The final absence that prompted the discharge was on April 30, 2007. Ms. Sawvel did not appear for work because she feared she would be discharged in front of her coworkers. Ms. Sawvel telephoned Mr. Fehls at approximately 6:00 a.m. and left a message for Mr. Fehls to call her. Ms. Sawvel called back between 8:00 and 9:00 a.m. and left a similar message. Mr. Fehls returned Ms. Sawvel's calls that afternoon and notified her that the corporate office had decided to discharge Ms. Sawvel from the employment.

Ms. Sawvel had been late on April 25 because she had overslept. Ms. Sawvel was absent from work on April 27. Ms. Sawvel overslept and then called in at 9:00 a.m. and left a message for Mr. Fehls to call her and advise her whether she was discharged from the employment. Ms. Sawvel did not appear for any part of her shift. Ms. Sawvel believed her job was in jeopardy based on prior attendance issues.

The employer lacked a written attendance policy. The employer expected employees to contact the plant manager as soon as possible if they knew they needed to be late or absent from work. The employer preferred that employee contact the employer with 30 minutes of the start of the 6:00 a.m. shift.

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 Ms. Sawvel's final absence on April 30, 2007 was an unexcused absence under the applicable law. The evidence indicates that Ms. Sawvel's absences on April 25 and 27 were also unexcused absences under the applicable law. All were due to matters of personal responsibility. Ms. Sawvel's obligation to appear for work did not go away just because Ms. Sawvel thought she might be discharged once she appeared. The evidence indicates three unexcused absences within four work days. Even in the absence of evidence from the employer, the evidence in the record indicates excessive unexcused absences.

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

DECISION:

The claims representative's May 18, 2007, reference 04, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw