

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BECKY A WELLER
Claimant

APPEAL NO. 12A-UI-06950-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS INC
Employer

OC: 05/20/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Becky Weller filed a timely appeal from the June 7, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 6, 2012. Ms. Weller participated. Becky Jacobsen, Human Resources Manager, represented the employer. Exhibits One through Six were received into evidence.

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: Becky Weller was employed by Farmland Foods, Inc., as a full-time production worker from 2007 until May 21, 2012, when Becky Jacobsen, Human Resources Manager, discharged her for attendance. Ms. Weller's regular work hours were 6:00 a.m. to 2:30 p.m., Monday through Friday.

The final absence that triggered the discharge occurred on May 18, 2012, when Ms. Weller was absent because she overslept. Ms. Weller did not notify the employer and was a no-call/no-show for her shift. On April 30, Ms. Weller had been absent due to illness, but had not notified the employer until 9:00 a.m. On May 14, Ms. Weller had been absent due to illness, but had not notified the employer until 11:30 a.m. The employer's attendance policy required that Ms. Weller call a designated telephone number prior to the scheduled start of her shift and use the automated absence reporting system to report her absences. Ms. Weller was aware of the policy.

In making the decision to discharge Ms. Weller from the employment, the employer considered additional absences going back to May 27, 2011. On that day, Ms. Weller left early due to illness so that she could go to a doctor appointment. Ms. Weller properly notified her supervisor of the need to leave. On June 9 and 27, Ms. Weller was absent due to illness and provided proper notice. On November 10, Ms. Weller left work early to care for her young daughter, who

was ill. Ms. Weller properly notified her supervisor. On November 28, 2011 and February 24, Ms. Weller was absent due to illness and properly reported the absences to the employer. The February 24 absence was the start of an extended absence. On April 19 and 24, 2012, Ms. Weller left work early due to illness and properly notified her supervisor. On April 25, Ms. Weller was absent due to illness and properly notified the employer.

The employer issued written warnings for attendance on February 24, 2012, and May 4, 2012, May 7, 2012. These were in addition to any earlier warnings Ms. Weller had received for attendance.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee’s failure to provide a doctor’s note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes unexcused absences on April 30, May 14, and May 18, 2012. In the final instance, Ms. Weller overslept and failed to make any contact with the employer. On May 14 and 18, Ms. Weller failed to timely notify the employer of her need to be absent, despite the ability to give proper notice and knowledge that she needed to provide notice prior to the start of her shift. These three absences occurred in the context of multiple warnings for attendance. These three absences constituted excessive unexcused absences. The rest of the absences were for illness properly reported and were excused absences under the applicable.

Based on the final three absences, all unexcused, the administrative law judge concludes that Ms. Weller was discharged for misconduct in connection with the employment. Accordingly, Ms. Weller 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. Weller.

DECISION:

The Agency representative's June 7, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs