IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BRYAN P ARBAUGH
414 N LINCOLN AVE
EAGLE GROVE IA 50533

ELECTROLUX HOME PRODUCTS INC
FRIGIDAIRE
C/O TALX EMPLOYER SVCS
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 06A-UI-07705-JTT
OC: 07/02/06 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Bryan Arbaugh filed a timely appeal from the July 20, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 24, 2006. Mr. Arbaugh participated. Mallory Russell represented the employer. Employer's Exhibits One through Four were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bryan Arbaugh was employed by Electrolux Home Products as a full-time technician from July 14, 2003 until June 30, 2006, when Facilitator Perry DeGroote discharged him for attendance.

The employer has a “no-fault” attendance policy whereby employees accrue attendance points. The employer does not document the basis for a particular absence. Under the written policy, employees are required to call in at least one hour prior to the scheduled start of their shift. The attendance policy is incorporated in the collective bargaining agreement. Mr. Arbaugh was aware of the policy. The employer issued written warnings to Mr. Arbaugh regarding his attendance point accrual on February 22, April 4, and April 24, 2006. The warnings do not indicate whether the absences that prompted the warnings were for illness properly reported to the employer or were for matters of personal responsibility.

The final absence that prompted the discharge occurred on June 28, 2006, when Mr. Arbaugh left work early without permission. Mr. Arbaugh left because he was upset that his breaks were being delayed and that he was not getting every break called for under the collective bargaining agreement. Mr. Arbaugh also left because he was upset the employer had not excused an absence based on Mr. Arbaugh’s need to take his grandmother to the hospital. Mr. DeGroote spoke with Mr. Arbaugh prior to Mr. Arbaugh’s early departure and attempted to persuade him to stay and complete his shift.

On January 26 and 27, Mr. Arbaugh was absent and properly notified the employer. The employer lacks information regarding the basis for the absence and Mr. Arbaugh cannot recall the basis of the absence. On February 7, Mr. Arbaugh left work early. The employer lacks information regarding the basis for the absence and Mr. Arbaugh cannot recall the basis of the absence. On February 8, Mr. Arbaugh was absent without notifying the employer. On February 16, Mr. Arbaugh was absent and properly notified the employer. The employer lacks information regarding the basis for the absence and Mr. Arbaugh cannot recall the basis of the absence. On March 29, Mr. Arbaugh was absent without notifying the employer. On June 13, Mr. Arbaugh left work early because he was feeling fatigued.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Arbaugh was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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).

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 Mr. Arbaugh's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 June 28, 2006 was unexcused. The evidence in the record establishes that the "no-call, no-show" absences on February 8 and March 29 were also unexcused. With regard to the rest of the absences, the employer has failed to meet its burden of proving the absences were unexcused under the applicable law. Accordingly, the evidence indicates a space of three months between the absence that

prompted the discharge and the March 29 absence. The evidence indicates a space of 49 days between the absence on March 29 and the February 8 absence. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Arbaugh's unexcused absences were not excessive. Mr. Arbaugh was discharged for no disqualifying reason. Accordingly, Mr. Arbaugh is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr.Arbaugh.

DECISION:

The Agency representative's July 20, 2006, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/pjs