

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMANDA M EVEN
Claimant

APPEAL NO. 08A-UI-08400-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**MANPOWER INTERNATIONAL INC
MANPOWER TEMPORARY SERVICES**
Employer

**OC: 07/06/08 R: 03
Claimant: Appellant (2-R)**

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

STATEMENT OF THE CASE:

Amanda Even filed a timely appeal from the September 11, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on October 6, 2008. Ms. Even participated. Branch Manager Kathy Joblinske represented the employer.

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: Amanda Even registered for work with Manpower Temporary Services on September 19, 2007 and was placed in her one and only temporary employment assignment on September 20, 2007. Ms. Even was assigned to perform maintenance duties at Ryder Logistics. The assignment was full-time and the regular hours of employment were 7:00 a.m. to 3:30 p.m., Monday through Friday. Ryder Logistics supervisor Chad Borwig supervised Ms. Even's work. Manpower Staffing Specialist Ellen Heuer oversaw Ms. Even's work on behalf of Manpower.

Ms. Even's assignment ended, and her employment with Manpower ended, on July 7, 2008, when Ms. Heuer notified Ms. Even that she was discharged from the work assignment and from her employment at Manpower. Ryder Logistics had notified Manpower that the assignment was ended due to attendance matters. These same attendance matters prompted Manpower to discharge Ms. Even.

Manpower has an absence notification policy that is contained in an employee handbook and reviewed with new employees at the time of hire. Ms. Even received a copy of the handbook and was familiar with the policy. Under the policy, Ms. Even was required to notify Manpower and her Ryder Logistics supervisor prior to the scheduled start of her shift if she needed to be absent. In cases where Ms. Even knew prior to the date of the absence that she needed to be

gone, Ryder Logistics' policy required that Ms. Even submit a written request for time off. Ms. Even was familiar with the Ryder Logistics time-off request policy.

The final absence that prompted the discharge occurred on July 7, 2008, when Ms. Even was absent from work for personal reasons. On Monday, July 7, Ms. Even notified her supervisor at Ryder Logistics that she needed the day off. Ms. Even also notified Manpower that she needed the day off. The weight of the evidence indicates the absence was for personal reasons. The weight of evidence does not indicate that the absence was due to Ms. Even's child being ill.

Ryder Logistics considered prior absences in making the decision to end Ms. Even's work assignment. Manpower considered prior absences in making the decision to discharge Ms. Even from Manpower's employ. Ms. Even was absent due to personal illness or the illness of her young child on November 6, and November 20, 2007, as well as on February 1, February 11, March 4, March 6, and March 26, 2008. Ms. Even properly reported each of these absences to the employer. On February 8, Ms. Even was absent so that she could attend the funeral of her sister's child. On February 6, Ms. Even had requested February 8 off so that she could attend the funeral and the employer had approved the request. On April 4, Ms. Even was absent, but neither the employer nor Ms. Even can recall the reason for the absence. On April 25, 28, and 29, Ms. Even was absent because she lacked proper child care. On June 24, Ms. Even notified the employer that she needed to be absent because she had to appear in court in connection with a Driving While Suspended charge. On July 1, Ms. Even properly notified the employer that she would have to be absent on July 3 for Juvenile Court proceedings and the employer approved the absence.

Manpower considered two prior reprimands for attendance in making the decision to discharge Ms. Even.

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 indicates that the final absence was for personal reasons, not illness of a child, and was an unexcused absence under the applicable law. With regard to the final absence, Ms. Even's testimony that the absence was based on the illness of her child was contradicted by other testimony Ms. Even provided, by the employer's testimony, and by Ms. Even's statements at the September 10, 2008, fact-finding interview. Ms. Even made no reference to a sick child being the basis for the final absence during the fact-finding interview or in her appeal letter. The evidence establishes additional unexcused absences on April 25, 28 and 29, when Ms. Even was absent due to a lack of child care. The evidence establishes one more unexcused absence on June 24, 2008, when Ms. Even was absent because she needed to attend court and failed to notify the employer of this until June 24, 2008. The rest of the absences were for illness properly reported, or approved ahead of time, and were excused

absences under the applicable law. Thus, we had three unexcused absences at the end of April, one of June 24, and a final one on July 7. Three were related to a temporary lack of child care, one was for a mandatory court hearing, and the final absence was for personal reasons still unknown.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Even was discharged for no disqualifying reason. Accordingly, Ms. Even is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Even.

The evidence calls into question whether Ms. Even has been available for work since she established her claim for benefits. This matter will be remanded to the Claims Division for determination of that issue.

DECISION:

The Agency representative's September 11, 2008, reference 02, 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.

The matter is remanded to a claims representative for determination of whether the claimant has been available for work since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw