

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENNIS D BAYSINGER
Claimant

APPEAL NO. 08A-UI-04666-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMCO ENTERPRISES INC
Employer

**OC: 03/30/08 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Emco Enterprises filed a timely appeal from the May 5, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 30, 2008. Claimant Dennis Baysinger participated. Todd Richardson of Unemployment Services/Talx represented the employer and presented testimony through Mary Bordwell, Senior Human Resources Generalist. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Seven 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: Dennis Baysinger was employed by Emco Enterprises as a full-time production worker from September 15, 2003 until April 1, 2008, when Senior Human Resources Generalist Mary Bordwell and Production Supervisor Ben Beaman discharged him for attendance. Mr. Baysinger's regular work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday, with occasional overtime work. Mr. Beaman was Mr. Baysinger's immediate supervisor.

The employer has a written attendance policy that is set forth in a collective bargaining agreement. Mr. Baysinger was familiar with the policy and signed his acknowledgment of the policy on September 15, 2003. The policy requires employees to contact the immediate supervisor prior to the scheduled start of the shift by dialing a designated phone number.

The final absence that prompted the discharge occurred on April 25, 2008. On that day, Mr. Baysinger was absent due to illness. Mr. Baysinger attempted to contact the employer prior to the start of his shift, but was not able to get through to Mr. Beaman until 7:10 a.m. At that time, Mr. Baysinger told Mr. Beaman that he was in pain and needed to see a doctor. Mr. Baysinger did in fact see a doctor and presented a doctor's excuse to Mr. Beaman when he returned to work. The next most recent absence that factored into the discharge decision

occurred on September 11, 2007, when Mr. Baysinger was absent four hours for personal business. The next most recent absence that factored into the discharge decision had occurred on November 22, 2006, when Mr. Baysinger was absent two hours for personal business.

The employer had issued two attendance warnings in 2005 and two attendance warnings in 2006.

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).

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 greater weight of the evidence in the record establishes that the final absence that triggered the discharge was an excused absence under the applicable law. The evidence indicates that Mr. Baysinger made a good faith effort to comply with the employer's absence notification policy by attempting to contact his supervisor prior to the scheduled start of his shift on March 25, 2008 by contacting a central number. Mr. Baysinger was initially unable to get through on that number, but persisted and was able to make contact with a supervisor within 10 minutes of the start of his shift. The employer's written policy did not require Mr. Baysinger to have his supervisor's direct telephone number. Instead, the policy required that he call a central number to notify his supervisor of the absence. Because the final absence was an excused absence, the evidence fails to establish a "current act." See 871 IAC 24.32(8). Because there was no current act, the administrative law judge concludes that Mr. Baysinger was discharged for no disqualifying reason. The administrative law judge need not further consider the prior absences. However, even if the evidence had established a final unexcused absence, the evidence would still not establish excessive unexcused absences.

Mr. Baysinger is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Baysinger.

DECISION:

The Agency representative's May 5, 2008, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw