

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HOLLIE J STOKER
Claimant

APPEAL NO. 07A-UI-08155-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ENERIC PETROLEUM CORP
Employer

**OC: 07/22/07 R: 03
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Hollie Stoker filed a timely appeal from the August 17, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 11, 2007. Ms. Stoker participated. The employer failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

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: Hollie Stoker was employed by Eneric Petroleum Corporation as a full-time Product Services Specialist from March 6, 2006 until July 23, 2007, when Paula Johnson, Product Services and Fee Based Programs Manager, discharged her for attendance. Ms. Stoker's hours of employment at the end of the employment were 8:30 a.m. to 5:00 p.m.

The final incident that prompted the discharge occurred on July 20, 2007. Ms. Stoker arrived at work on time. In order to clock in, Ms. Stoker needed to access the computer at her workstation. When Ms. Stoker arrived at her work station, Ms. Johnson was standing in front of the workstation. Ms. Johnson was engaged in a conversation with another employee. Ms. Johnson was blocking Ms. Stoker's access to her workstation. Ms. Johnson decided to wait to access her work computer until Ms. Johnson was finished with her conversation, rather than interrupt Ms. Johnson's conversation with the other employee. The employer's timekeeping system rounds start times and stop times to the nearest quarter hour. Because Ms. Stoker was not able to immediately access her workstation upon arrival, the employer's timekeeping system rounded her start time up to 8:45 p.m. The time system documented Ms. Stoker as tardy when she had in fact not been tardy.

At the end of the workday on Monday, July 23, Ms. Stoker was summoned to a meeting with Ms. Johnson and Peggy Hoskins, Human Resources Assistant Vice President. Ms. Johnson advised Ms. Stoker that she was being discharged for repeated tardiness and cited July 20 as

the final incident. When Ms. Stoker attempted to explain or discuss what had actually occurred on July 20, Ms. Johnson refused to further discuss the matter and exited the conference room. Ms. Hoskins had Ms. Stoker remained in the conference room until Ms. Johnson and other employees had exited the workplace and then escorted Ms. Stoker to her desk and out of the facility.

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).

Because the employer failed to participate in the hearing, the employer failed to present any evidence whatsoever to support the allegation that Ms. Stoker was discharged for misconduct. Because the employer had the burden of proof, misconduct cannot be established. See 871 IAC 24.32(4). In addition, the evidence in the record indicates that the final alleged tardiness that prompted the discharge was not in fact an incident of tardiness at all. Accordingly, the evidence fails to establish a "current act." Again, misconduct cannot be established. See 871 IAC 24.32(8).

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

DECISION:

The claims representative's August 17, 2007, reference 01, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css