

**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**

**LISA R DAWSON
900 COLVER ST
MUSCATINE IA 52761-4505**

**ALLSTEEL INC
200 OAK ST
PO BOX 1109
MUSCATINE IA 52761**

**Appeal Number: 06A-UI-04090-JTT
OC: 03/19/06 R: 04
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
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Claimant Lisa Dawson filed a timely appeal from the April 4, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 2, 2006. Claimant participated. The employer failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibits A through F were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lisa Dawson was employed by Allsteel as a full-time utility worker from November 11, 1997 until

March 20, 2006, when Supervisor Stephanie Rife and Human Resources Manager Mike Allbee discharged her for attendance.

The final absence that prompted the discharge occurred on March 20, when Ms. Dawson was tardy two or three minutes. Ms. Dawson was late because her infant son was sick and it was taking longer to get the baby ready to go to the babysitter. The employer ordinarily provides employees with a six-minute grace period after the scheduled start of a shift before the employee is deemed tardy under the employer's attendance policy. The employer's notification policy required Ms. Dawson to notify the employer at least 30 minutes prior to the scheduled start of a shift if she needed to be absent or tardy and Ms. Dawson was aware of this policy. On March 20, Ms. Dawson did not notify the employer that she would be late. Ms. Dawson's prior absences were due to the illness of her baby and were properly reported to the employer. Ms. Dawson's baby was born premature and is a medically fragile child.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Dawson 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).

In order for Ms. Dawson's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that Ms. Dawson'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).

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).

Because the employer failed to participate in the hearing, the evidence in the record is limited to the testimony and exhibits presented by Ms. Dawson. The evidence in the record indicates that on March 20, Ms. Dawson was not in fact tardy, because she had complied with the employer's grace period policy of arriving within six minutes of the scheduled start of her shift. Accordingly, the evidence fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Dawson for unemployment insurance benefits. See 871 IAC 24.32(8). Even if the evidence has shown a final unexcused absence on March 20, the evidence in the record would still not have established excessive unexcused absences. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Dawson was discharged for no disqualifying reason. Ms. Dawson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Dawson.

DECISION:

The Agency representative's decision dated April 4, 2006, reference 01, 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.

jt/kkf