

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EMILY A CARLSON**  
Claimant

**APPEAL NO. 11A-UI-06094-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY  
CASEY'S GENERAL STORES**  
Employer

**OC: 03/27/11  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Emily Carlson filed a timely appeal from the April 26, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 2, 2011. Ms. Carlson participated for part of the hearing, but voluntarily terminated her participation prior to the conclusion of the hearing. Connie Smith, area supervisor, represented the employer. Exhibits 1 through 13 were received 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: Emily was employed by Casey's as a full-time store manager until March 28, 2011, when Area Supervisor Connie Smith discharged her for repeated tardiness. Ms. Smith was Ms. Carlson's immediate supervisor. The final incident of tardiness occurred on March 28, 2011 and followed a similar incident on March 25, 2011. On both dates, Ms. Carlson was late for personal reasons and failed to notify the employer prior to the scheduled start of her shift that she needed to be late. The employer's written policy required that Ms. Carlson telephone Ms. Smith prior to the scheduled start of her shift if she needed to be absent or late. Ms. Carlson was aware of the policy but elected not to follow it on multiple dates.

In making the decision to discharge Ms. Carlson from the employment, Ms. Smith considered other absences or tardiness. On November 11, 2010, Ms. Carlson was more than two hours late for work, failed to contact the employer prior the scheduled start of her shift, and then misrepresented her actual time of arrival. On December 10, 2010, Ms. Carlson was late for personal reasons and failed to notify the employer prior to the shift. On March 18, 2011, Ms. Carlson entered into an unauthorized shift change with an assistant manager and then for personal reasons appeared late for the shift she had switched to.

Ms. Carlson's attendance issues occurred in the context of repeated reprimands for attendance and warnings that the conduct could lead to termination.

### **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 evidence in the record establishes unexcused tardiness on November 11, and December 10, 2010, and March 18, 25, and 28, 2011. Ms. Carlson's unexcused tardiness was excessive and constituted misconduct in connection with the employment. Ms. Carlson is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Carlson.

**DECISION:**

The Agency representative's April 26, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

The claimant may file a written request to reopen the record within 15 days of the entry of this decision and the administrative law judge will consider whether there is good cause to reopen the record. Any such request shall state in detail the reason why the claimant believes there is good cause to reopen the record and why all appropriate evidence was not presented at the time of the hearing.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/kjw