

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUTH A TRAVER
Claimant

APPEAL NO. 07A-UI-02359-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE PINES STEAKHOUSE INC
THE PINES
Employer

OC: 02/04/07 R: 01
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The Pines Steakhouse filed a timely appeal from the February 26, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 26, 2007. Claimant Ruth Traver participated and presented additional testimony through Steve Carr. A.J. Poepppe, Manager and owner, represented the employer and presented additional testimony through Cindy Hulbert, Kitchen Supervisor. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

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: Ruth Traver was employed by The Pines Steakhouse as part-time dishwasher and kitchen help from October 5, 2005 until January 25, 2007, when Owner/Manager A.J. Poepppe discharged her for attendance.

The absences that prompted the discharge occurred on Monday, January 22 and Tuesday, January 23, 2007. Ms. Traver was scheduled to work the lunch shift on both days and the evening shift on January 22. The lunch shift began at 11:30 a.m. and the evening shift began at 5:30 p.m. Ms. Traver had traveled to Omaha the previous weekend and lacked transportation to return to Atlantic for her shifts. On January 22, Ms. Traver left a message for Kitchen Supervisor Cindy Hulbert at 12:50 p.m., indicating that she would be absent from her 11:30 a.m. shift. At 1:30 p.m., Ms. Traver called again and spoke with Ms. Hulbert. Ms. Traver told Ms. Hulbert that she would be absent from her evening shift. Ms. Traver's niece also worked for the restaurant. Ms. Traver had her stepfather contact Ms. Traver's niece, who appeared and worked Ms. Traver's evening shift. On January 23, Ms. Traver telephoned Ms. Hulbert at 9:30 a.m. to say that she still had not obtained a ride home and would be absent for her lunch shift. The employer lacked a formal attendance policy, but had informed Ms. Traver that the employer expected her to call in before the start of her shift if she needed to be absent. Owner/Manager A.J. Poepppe was away from the restaurant no January 22 and 23. Prior to his absence, Mr. Poepppe told Ms. Traver that he needed her to be

certain to appear for her shifts while he was gone, especially the lunch shifts, when there was no one else available to cover the shift. Ms. Traver had acknowledged her obligation to appear for the shifts.

When Ms. Traver appeared for her shift on January 25, Mr. Poeppe told her she was discharged from the employment based on being absent for the three shifts. Mr. Poeppe did not consider any other absences in making the decision to discharge Ms. Traver from the employment.

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 Ms. Traver's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 that Ms. Traver's absences during January 22-23 were due to lack of transportation, an issue of personal responsibility, and were therefore unexcused absences under the applicable law. The evidence indicates that Ms. Traver demonstrated poor judgment when she traveled to Omaha without a secure means to return to Atlantic. On the other hand, Ms. Traver took appropriate steps to secure a replacement for the one shift where there was someone available to cover for her. The administrative law judge notes that the absences arose from the same incident. The evidence in the record is insufficient to establish any additional unexcused absences or a history of reprimands for attendance.

Based on the circumstances of this case, the administrative law judge concludes that the evidence does not establish excessive unexcused absences. Ms. Traver was discharged for no disqualifying reason. Ms. Traver is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Traver.

DECISION:

The Agency representative's February 26, 2007, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. Claimant is eligible for benefits, provided she is otherwise eligible. Employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw