

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BETH A WOOTERS
Claimant

APPEAL NO. 07A-UI-07216-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CNH AMERICA LLC
Employer

**OC: 02/18/07 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

CNH America filed a timely appeal from the July 18, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on August 21, 2007. Claimant Beth Wooters participated and was represented by union representative Tony Wallace. Laura Hubbard, Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One, Two, A, B, and C into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Beth Wooters was employed by CNH America as a full-time production worker from May 15, 2006 until June 26, 2007, when Human Resources Manager Laura Hubbard began to take steps under a collective bargaining agreement to discharge Ms. Wooters for attendance. Ms. Wooters' regular hours of employment were 7:00 a.m. to 3:30 p.m. The final absence that prompted the discharge occurred on June 26, 2007. On that day, Ms. Wooters reported an absence approximately one hour after the scheduled start of her shift. The employer's attendance policy required Ms. Wooters to notify the employer at some point prior to the end of her scheduled shift if she needed to be absent.

Pursuant to the agreement that covered Ms. Wooters' employment, Ms. Wooters' "seniority" was to be terminated if she was absent for "more than three (3) consecutive working days without properly notifying the Company, unless circumstances make it impossible to so do." Ms. Wooters had been absent without notice on June 21, 22, and 25. On the afternoon of Thursday, June 21, after her regular working hours, Ms. Wooters was a victim of domestic abuse assault. Ms. Wooters was examined at an emergency room that night. Ms. Wooters had bruising from her neck to her arms. Ms. Wooters went to stay with her parents. Ms. Wooters' assailant also worked at CNH America. Ms. Wooters was afraid to return to work because this

would bring her into contact with her assailant. On Friday, June 22, Ms. Wooters was absent from work and did not notify the employer. On Monday, June 25, Ms. Wooters was again absent from work and did not notify the employer. When Ms. Wooters did not make contact with the employer *prior* to the scheduled start of her shift on June 26, Ms. Hubbard concluded that this constituted the fourth absence that would trigger discharge pursuant to the collective bargaining agreement.

Approximately one hour after the scheduled start of her shift on June 26, Ms. Wooters contacted Ms. Hubbard to indicate she needed the day off. Ms. Hubbard told Ms. Wooters that she had already decided to take steps to discharge Ms. Wooters, but agreed to meet with Ms. Wooters to discuss the situation. The further discussion on June 26 did not alter Ms. Hubbard's decision to move toward discharge. The further discussion included a request from Ms. Wooters to move to the second shift so that she would not have to work with her assailant.

Ms. Wooters' absences on June 21, 22, and 25, followed absences on June 6-8, when Ms. Wooters was absent in connection with the death of her daughter's paternal grandmother on June 5. The employer deemed these absences unexcused because the deceased was not an immediate family member. On June 11, the production plant shut down. The production plant recommenced operation on June 18. Ms. Wooters was absent for illness properly reported on June 18-20.

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 greater weight of the evidence indicates that the final absence that prompted the discharge occurred on June 26. The greater weight of the evidence indicates that Ms. Wooters was absent on this day because she was afraid to return to work and be confronted with her assailant. The weight of the evidence indicates that Ms. Wooters properly notified the employer of the absence by contacting the employer prior to the scheduled end of her shift. The administrative law judge concludes that the final absence that prompted the discharge was an excused absence and did not constitute misconduct. Because the final absence was excused, the evidence fails to establish a "current act" that would disqualify Ms. Wooters for unemployment insurance benefits. See 871 IAC 24.32(8). The evidence establishes that the next most recent absences on June 22 and 25 that were technically unexcused absences under the applicable law, but that these absences involved extenuating circumstances. The absences were based on Ms. Hubbard's fear of returning to work and having to confront her assailant. The evidence in the record indicates that the employer erroneously invoked the termination provision of the collective bargaining agreement, because there was no fourth no-call, no-show absence.

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

DECISION:

The claims representative's July 18, 2007, reference 02, decision is affirmed. 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/kjw