

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER E CHRISTENSEN
Claimant

APPEAL NO. 11A-UI-06024-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HEARTLAND EMPLOYMENT
SERVICES LLC**
Employer

**OC: 04/03/11
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 27, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 3, 2011. Claimant Jennifer Christensen did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Kathy Woods, CDC (Assistant Director of Nursing), represented the employer. Exhibit One was 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: Jennifer Christensen, L.P.N., was employed by Manor Care in West Des Moines as a full-time nursing supervisor from January 31, 2011 until March 15, 2011, when Holly Benedict, director of nursing, discharged her for attendance. Ms. Christensen's immediate supervisor was Kathy Woods, CDC (Assistant Director of Nursing). The final incident that triggered the discharge was Ms. Christensen's alleged no-call, no-show absence for her shift on March 12, 2011. The employer had a written policy that subjected employees to discharge from the employment in the event they were absent without notifying the employer during the initial 90 days of employment. Ms. Christensen had signed her acknowledgment of the policy at the start of her employment. Ms. Christensen was in fact not a no-call, no-show for the March 12 shift. Ms. Christensen was scheduled to work at 9:45 p.m. At 9:20 p.m., Ms. Christensen had telephoned the workplace to report that her blood sugar was low, that she needed to eat a candy bar before she reported for work, and that she would be late. Ms. Christensen then did not appear for the shift. The attendance policy required that Ms. Christensen notify the employer two hours prior to her shift if she needed to be absent. Ms. Christensen did not do that and did not appear for the shift after she said she would.

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 employer's witness was very poorly prepared for the hearing and provided minimal, marginally useful, and erroneous information. The witness lacked copies of the employer's proposed exhibits. The witness could not provide a start date or end date for the employment. The witness misstated Ms. Christensen's nursing credentials, or at least provided information contradicted by the employer's exhibit material. The evidence in the record establishes at most a single unexcused absence on March 12, 2011, when Ms. Christensen called to say she would be late and then failed to appear for a shift. The employer's documentary evidence establishes that Ms. Christensen was not a no-call, no-show on March 12, but that the absence was nonetheless an unexcused absence under the applicable law. The single unexcused absence is not enough to establish misconduct in connection with the employment for unemployment insurance purposes.

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

DECISION:

The Agency representative's April 27, 2011, reference 01, 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