

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELL M PORTER**  
Claimant

**APPEAL NO. 08A-UI-06021-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 05/25/08 R: 01**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Care Initiatives filed a timely appeal from the June 19, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 16, 2008. Claimant Michelle Porter did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Attorney Josh Burrows of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Molly Grundstrom, R.N., Director of Nursing. 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 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: Michelle Porter was employed by Care Initiatives as a full-time Licensed Practical Nurse/Charge Nurse from March 13, 2008 until May 27, 2008, when Director of Nursing Molly Grundstrom and Administrator Lori Harvey discharged her. Ms. Porter worked at the Bedford Nursing and Rehabilitation Center. Ms. Porter worked three 12-hour shifts per week and every other weekend. Ms. Porter's 12-hour shifts were from 6:00 p.m. to 6:00 a.m. Ms. Grundstrom was Ms. Porter's immediate supervisor.

The final incident that prompted the discharge occurred on May 13, 2008, when Ms. Porter left work early at 3:00 a.m. At about 2:00 a.m., Ms. Porter telephoned Ms. Grundstrom at home. Ms. Porter told Ms. Grundstrom that her legs were swollen, that she could not walk, and that she could not finish her shift. Ms. Porter is a heavy-set person. Ms. Porter requested that Ms. Grundstrom cover the remainder of her shift. When Ms. Grundstrom pressed Ms. Porter on whether she was able to work the remaining hours of her shift, Ms. Porter insisted that she needed to leave work. Ms. Porter remained on duty until Ms. Grundstrom arrived to cover the remainder of her shift.

On May 16, Ms. Grundstrom met with Ms. Porter to discuss the May 13 early departure and prior attendance issues. Ms. Grundstrom asked Ms. Porter whether there was anything the employer could do to help Ms. Porter or whether there was anything Ms. Porter needed to tell the employer.

Ms. Grundstrom did not indicate to Ms. Porter that her May 13 early departure would place Ms. Porter's employment in jeopardy.

The employer had other concerns about Ms. Porter's employment. However, the employer was aware of all of the underlying incidents prior to the May 13 early departure and prior to the May 16 conference.

On May 27, Administrator Lori Harvey notified Ms. Porter that she was discharged from the employment. Ms. Harvey told Ms Porter that she was "not a good fit."

#### **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 fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). The evidence indicates that the employer was aware of the May 13 absence on that date. The evidence indicates that the employer addressed the incident with Ms. Porter on May 13 and 16. The evidence indicates that the employer failed to notify Ms. Porter until May 27 that the May 13 absence provided a possible basis for Ms. Porter's discharge from the employment. The employer unreasonably delayed from the time of the absence to the time it notified Ms. Porter that the absence placed her employment in jeopardy. Because there was no "current act," the administrative law judge concludes that Ms. Porter was discharged for no disqualifying reason. See 871 IAC 24.32(8). Accordingly, Ms. Porter is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Porter. Because there was not "current act," the administrative law judge need not further consider the final incident that prompted the discharge or the earlier incidents. However, the evidence in the record fails to establish that Ms. Porter lacked a legitimate reason for needing to leave her shift early on May 13.

#### **DECISION:**

The Agency representative's June 19, 2008, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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