

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMI A SIBAJA-TOLEDO
Claimant

APPEAL NO. 09A-UI-02086-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 01/04/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 4, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 10, 2009. Claimant Jami Sibaja-Toledo was not available at the number she provided for the hearing and did not participate. Fred Metcalf, Human Resources Associate, represented the employer. Exhibits One through Ten were received 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: Jami Sabaja-Toledo was employed by Good Samaritan Society as a certified nursing assistant from May 13, 2008 until December 12, 2008, when Karen Kaiser, Director of Nursing, and Angelo Prevo, Assistant Director of Nursing, discharged her from the employment. Both Ms. Kaiser and Ms. Prevo are still with the employer, but neither testified.

The final incident that prompted the discharge was Ms. Sibaja-Toledo's absence from a shift on December 5, 2008. On that day, Ms. Sibaja-Toledo was absent due to illness. The illness may or may not have been properly reported. Ms. Sibaja-Toledo had been absent on October 14, 2008 and tardy on October 15 due to doctor appointments. Ms. Sibaja-Toledo may or may not have properly reported these absences.

The employer witness has no firsthand knowledge of the matters that prompted the employer to discipline and discharge Ms. Sibaja-Toledo and was not involved in the discipline and discharge. Those persons with firsthand knowledge of the above matters continue with the employer.

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).

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).

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).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish a "current act" of misconduct or any past acts of misconduct. The employer failed to produce any testimony from persons with firsthand knowledge of the incidents and disciplinary matters that led to claimant's discharge from the employment. The employer had the ability to present testimony from persons with firsthand knowledge, but failed to do so. The employer's witness had no personal knowledge of the incidents or disciplinary action leading to the claimant's discharge from the employment. The employer witness's testimony consisted of the witness interpreting documentation generated by others. During the witness's testimony, the administrative law judge eventually concluded that the witness's interpretation of events was unreliable and amounted, by and large to speculation. Misconduct cannot be established.

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

DECISION:

The Agency representative's February 4, 2009, 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/css