

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BOBBI JO RITCHIE
1201 E BELL AVE APT 6
DES MOINES IA 50315-7400

QWEST CORPORATION
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 06A-UI-05480-JTT
OC: 04/30/06 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Bobbi Jo Ritchie filed a timely appeal from the May 18, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 13, 2006. Claimant participated. The employer failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The administrative law judge took official notice of the Agency administrative file.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bobbi Jo Ritchie was employer by Qwest as full-time telephone customer service representative and sales person from February 14, 2005 until May 3, 2006, when supervisor/coach Laura Griffith discharged her for attendance. The final absence that prompted the discharge occurred on

May 1. On that date, Ms. Ritchie discovered that her regular childcare provider had gone out of town without warning Ms. Ritchie. Ms. Ritchie took her child to work and spoke to a supervisor about the situation. The supervisor allowed Ms. Ritchie to go home to look for childcare. Ms. Ritchie thought her husband would be available to provide childcare, but he was not available. Ms. Ritchie notified the employer that she was unable to find childcare and would not be able to return to work that day. The next day, Ms. Ritchie returned to work. On May 3, the employer discharged Ms. Ritchie based on attendance.

Ms. Ritchie had received prior warnings for attendance. However, Ms. Ritchie's prior absences had been for illness properly reported to the employer. In January 2006, Ms. Ritchie received a warning for tardiness. However, the most recent incidence of tardiness had occurred on December 7, 2005, when Ms. Ritchie was five minutes late in returning from break.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Ritchie was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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. Ritchie'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. Ritchie's final absence on May 1, 2006 was due to a lack of childcare. This is considered a matter of personal responsibility and the absence is, therefore, deemed an unexcused absence under the law. The evidence indicates that Ms. Ritchie's most recent unexcused absence had been the incident of tardiness on December 7, 2005. The evidence indicates that Ms. Ritchie's prior full day absences had been for illness properly reported to the employer and would, therefore, be deemed excused absences. The administrative law judge notes that the employer failed to participate in the hearing and, thereby, failed to produce any evidence to support the allegation that Ms. Ritchie was discharged for misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ritchie's unexcused absences were not excessive and that Ms. Ritchie was discharged for no disqualifying reason. Accordingly, Ms. Ritchie is eligible for

benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Ritchie.

DECISION:

The Agency representative's decision dated May 18, 2006, reference 01, is reversed. 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.

jt/pjs