

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIET L HUFF
Claimant

APPEAL NO. 12A-UI-05082-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC
Employer

OC: 04/08/12
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 April 27, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 23, 2012. Claimant Juliet Huff participated. Darlene Brown, Human Resources Assistant, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and Exhibits Two through Seven were 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: Juliet Huff was employed by Five Star Quality Care, Inc. as a full-time certified nursing assistant from March 2011 until April 11, 2012, when the employer discharged her for attendance. Ms. Huff's work hours were 6:00 a.m. to 2:30 p.m.

The employer had a written attendance policy contained in an employee handbook. The written policy required employees who were going to be absent from work "to call their designated supervisor (2) two hours before the beginning of their shift on each day that they are expecting to be absent." Ms. Huff received a copy of the employee handbook at the start of her employment. The employer cites a different policy, not contained in the employee handbook, whereby Ms. Huff was expected to call in at least four hours prior to the shift, or find a replacement, to avoid having an absence count against her. The employer also cites a requirement that Ms. Huff, at minimum, call in prior to the start of the shift.

The final absence that triggered the discharge was Ms. Huff's early departure from work on April 10, 2012. On that day, Ms. Huff arrived to work on time, but left at 8:23 a.m. to care for her sick child. Ms. Huff notified the shift supervisor, Autumn Garmoe, L.P.N., when she arrived for work that she would need to leave to care for her sick child, who had a sinus infection and fever. Ms. Huff's mother ordinarily cared for the child, but was not available to care for the child very

long that day because Ms. Huff's sister had a court appearance and Ms. Huff's mother wanted to attend the court proceeding. Ms. Huff's next most recent absence had been on March 11, 2012, when Ms. Huff was absent due to illness and properly reported the absent to the employer. Ms. Huff had multiple earlier absences that the employer took into consideration when making the decision to discharge her from the employment. Most of these were absences due to illness properly reported to the employer or involved tardiness. The employer had issued three written reprimands for attendance prior to discharging Ms. Huff from the employment.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes that the final absence that triggered the discharge was based on the need to care for a sick child. For this reason, and because Ms. Huff appeared for work and gave proper notice of her need to leave work early, the absence was an excused absence under the applicable law. The next most recent absence, a month earlier, was also due to illness and was properly reported to the employer. That absence was also an excused absence under the applicable law. The evidence fails to establish a "current act" of misconduct, because Ms. Huff was discharged in April and one has to go all the way to February to find an absence that would be an unexcused absence under the applicable law. Because the evidence does not establish a "current act" of misconduct, the discharge would not disqualify Ms. Huff for unemployment insurance benefits. Because Ms. Huff was discharged for no disqualifying reason, she is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Huff.

DECISION:

The Agency representative's April 27, 2012, 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/pjs