

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENISE D SCOVEL**  
Claimant

**APPEAL NO. 10A-UI-03434-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PINNACLE HEALTH FACILITIES XVII LP**  
Employer

**Original Claim: 09/02/07  
Claimant: Appellant (2-R)**

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

**STATEMENT OF THE CASE:**

Denise Scovel filed a timely appeal from the February 22, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on April 15, 2010. Ms. Scovel participated. Pat Wilfang, R.N., Director of Nursing, represented the employer.

**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: Denise Scovel was employed as a full-time Certified Nursing Assistant (C.N.A.) from August 2009 until October 14, 2009, when Pat Wilfang, R.N., Director of Nursing, discharged her from the employment for attendance and other conduct. Ms. Scovel worked the overnight shift, 10:00 p.m. to 6:00 a.m.

The final incident that prompted the discharge occurred on January 14, 2009, when Ms. Scovel used the employer's phone to talk to her boyfriend. Charge Nurse Jennifer Creech was Ms. Scovel's supervisor during the shift in question. Nurse Creech is still with the employer.

In making the decision to discharge Ms. Scovel from the employment, the employer also considered an incident on October 8, 2009. On that date, Ms. Scovel intentionally overdosed on two psychotropic medications and then appeared for work. Ms. Scovel is bipolar. Ms. Scovel told the charge nurse she had taken the drugs, requested to leave, and was sent home with the understanding that she would go to an emergency room. Director of Nursing Wilfang does not know which charge nurse was involved in that incident.

In making the decision to discharge Ms. Scovel, the employer also considered at least one incident wherein Ms. Scovel's boyfriend was allowed into the facility outside of normal visiting hours.

## 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). A single unexcused absence does not constitute misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

The case comes down to the employer's failure to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct. The employer failed to present any testimony, or even a written statement, from the charge nurses involved in the incidents that factored into the decision to end Ms. Scovel's employment. The evidence indicates that the final incident that triggered the discharge was Ms. Scovel's use of the company phone on October 14, 2009, to speak with her boyfriend. Ms. Scovel asserted in her testimony that she used the phone with the charge nurse's approval, made the call during her break, and did not engage in the argument with her boyfriend that the employer alleges took place. The employer failed to present any testimony from Nurse Creech to counter Ms. Scovel's assertions. For that reason, the evidence fails to establish that Ms. Scovel made unauthorized use of the phone on October 14, 2009.

The evidence indicates that Ms. Scovel appeared at the workplace on October 8 after intentionally overdosing on her psychotropic medications. The evidence indicates that Ms. Scovel recognized she was in no condition to work, requested to leave, and was allowed to leave. The evidence establishes an unexcused absence, given that the overdose was an intentional act. This single unexcused absence would not constitute misconduct. Ms. Scovel's conduct in arriving at work after taking the overdoses was clearly not in the interest of the employment, but—in light of the available evidence, or lack of the same—did not rise to the level of misconduct that would disqualify Ms. Scovel for unemployment insurance benefits. Ms. Scovel's mental health condition is a mitigating factor. The employer failed to present evidence to indicate there was anything more to the situation.

Finally, the employer failed to present evidence to rebut Ms. Scovel's assertion that the charge nurse, not Ms. Scovel, has allowed Ms. Scovel's boyfriend into the facility after visiting hours, and apparently only for purpose of making an apparent snack run for the staff.

The employer has simply failed to provide the evidence necessary to support its assertion that Ms. Scovel was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge must conclude that Ms. Scovel was discharged for no disqualifying reason. Accordingly, Ms. Scovel is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Scovel.

The evidence in the record raises the question of whether Ms. Scovel has been able to work and available for work since she established her claim for benefits. This matter will be remanded to the Claims Division so that those issues may be investigated.

**DECISION:**

The Agency representative's February 22, 2010, reference 02, decision 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.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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