

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CLAUDIA L RICHARDS**  
Claimant

**APPEAL NO. 12A-UI-04214-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES MOINES IND COMMUNITY SCH DIST**  
Employer

**OC: 03/11/12**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Claudia Richards filed a timely appeal from the April 9, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 7, 2012. Ms. Richards participated. Cathy McKay, Risk Manager, represented the employer and presented additional testimony through Thomas Mitchell, Director of Human Resources. Exhibit A was received into evidence.

**ISSUE:**

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claudia Richards was employed by the Des Moines Independent Community School District as a full-time teacher from 1984 until January 25, 2012, when she was suspended from the employment for dishonesty in connection with use of sick leave benefits. Ms. Richards taught at East High School from 1997 until separating from the employment.

In December, Ms. Richards advised the East High School registrar that she would be sick on December 19, 20 and 21. These were the three days immediately preceding the start of the District's winter recess. Ms. Richards was not sick. Ms. Richards used the three days to extend her winter break trip to California. Winter recess started on December 22, 2011 and the ended on January 1, 2012.

Ms. Richards returned to school on January 2 and continued to perform her duties until January 18, 2012, when East High School Principal Steve Johns told her he had received an anonymous note indicating Ms. Richards had used the three days consecutive sick days in December to go on a trip. Principal Johns did not specify how long he had been in possession of the information. Principal Johns told Ms. Mitchell that he would refer the matter to Thomas Mitchell, Director of Human Resources for the District.

Mr. Mitchell subsequently sent Ms. Richards an email message that directed her to appear for a meeting on January 25. At that meeting, Mr. Mitchell provided Ms. Richards with the choice between being discharged from the employment or taking early retirement. Ms. Richards initially decided not to take early retirement, but subsequently changed her mind and accepted early retirement to be effective June 1, 2012 in order to continue insurance coverage. Between the January 25 suspension and the June 1, 2012 effective date of the early retirement, Ms. Richards continues on suspension.

#### **REASONING AND CONCLUSIONS OF LAW:**

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

Iowa Administrative Code rule 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The weight of the evidence establishes that Ms. Richards did not voluntarily quit, but was instead suspended on January 25, 2012 and discharged shortly thereafter. That the parties agreed to a later date as the effective date of the early retirement does not change the fact that there was an involuntary separation from the employment on January 25, 2012.

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).

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).

Significant aspects of Ms. Richards' testimony were simply not credible. Ms. Richards' inclination to dissemble during the hearing was evident in her multiple attempts to provide non-responsive answers in response to clearly stated questions. The weight of the evidence establishes that the Ms. Richards intentionally misinformed the District about the basis for her need to be off work during the three days in December that preceded the start of the winter break. Ms. Richards' assertion that such misuse of sick leave was standard practice or tacitly

accepted behavior was not credible. Ms. Richards' assertion that she was denied the opportunity to make an appropriate request to the Principal for time off is disingenuous. Ms. Richards appears to argue that the District should have given her a pass on the conduct due to the length of her employment. The weight of the evidence indicates that Ms. Richards was intentionally dishonest in requesting the sick leave. Each of the three consecutive absences in December was an unexcused absence under the applicable law. The unexcused absences were excessive. Ms. Richards' conduct constituted misconduct in connection with the employment.

The remaining question is whether Ms. Richards' violations of policy constituted current acts of misconduct at the time Principal Johns broached the subject with Ms. Richards or at the time Mr. Mitchell suspended Ms. Richards on January 25, 2012. The employer has failed to present sufficient evidence to establish when Principal Johns became aware of the misconduct or how long he held onto that information before speaking with Ms. Richards about it or referring the matter to Mr. Mitchell. The employer had the ability to present testimony through Principal Johns to clarify such matters, but elected not to present such testimony. The employer has presented insufficient evidence to establish a current act of misconduct. In the absence of a current act, the administrative law judge concludes that Ms. Richards was suspended and discharged for no disqualifying reason. Ms. Richards is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Richards.

**DECISION:**

The Agency representative's April 9, 2012, reference 01, decision is reversed. The discharge was not based on a current act. 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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