

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE D CARRINGTON
Claimant

APPEAL NO. 11A-UI-01613-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 01/09/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Nicole Carrington filed a timely appeal from the February 2, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 8, 2011. Mr. Carrington participated. Patty Steelman represented the employer and presented additional testimony through Joy Bowman and Sonya Ranck. Exhibits One through Eight 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: Nicole Carrington was employed by Mercy Hospital in Des Moines as a part-time perioperative care tech from 2006 until January 11, 2011, when Joy Bowman, Interim Nursing Manager, and Patty Steelman, Human Resources Business Partner, discharged her from the employment for tardiness. Ms. Bowman was Ms. Carrington's immediate supervisor beginning in December 2010 and had been a charge nurse with supervisory authority over Ms. Carrington before December 2010. From the start of Ms. Carrington's employment until the change in supervisors in December 2010, Sonja Ranck, Post-Anesthesia Care Unit Manager, was Ms. Carrington's immediate supervisor. Ms. Carrington was generally assigned to the 7:30 a.m. to 4:00 p.m. shift. If Ms. Carrington needed to be absent from work, the employer's policy required that she notify her supervisor or a charge nurse no later than an hour before her shift. Ms. Carrington was aware of the policy.

The final incident of tardiness that triggered the discharge occurred on January 11, 2011, when Ms. Carrington was late getting to work because she had overslept. Ms. Carrington had also been late getting to work for personal reasons on January 7, 2011.

On December 7, 2010, Ms. Ranck met with Ms. Carrington for Ms. Carrington's annual performance review. In connection with that meeting, Ms. Ranck warned Ms. Carrington that she would face discharge from the employment if she incurred two more instances of tardiness.

In making the decision to discharge Ms. Carrington from the employment, the employer considered tardiness going back to July 2010. Ms. Carrington was tardy for personal reasons on July 7, 8, 14, and 15. On August 26, Ms. Carrington clocked in at 9:24 a.m. because she wanted to take her children to school on the first day of school. Ms. Carrington had, with Ms. Bowman's approval, exchanged her 7:30 a.m. start time for her cousin's 9:30 a.m. start time. On August 31, Ms. Carrington was two minutes late because she needed to secure a babysitter for her five-year-old son, who had broken his arm. Ms. Bowman had approved the late arrival in advance. On September 2, Ms. Carrington was two minutes late due in connection with securing a family to care for her son, but Ms. Carrington had not approved this late arrival in advance. On September 7, Ms. Carrington clocked in at 9:33 a.m. Ms. Carrington had commenced pre-nursing classes at DMACC and obtained Ms. Bowman's permission to stay at DMACC and make up a test. Ms. Carrington was then late for personal reasons on September 14, 16, and 21. On September 22, Ms. Carrington clocked in at 11:01 a.m. Ms. Carrington needed to take her son to a medical appointment and had prior approval from Ms. Bowman for the late arrival. Ms. Carrington was then late for personal reasons on October 14 and 18. On October 20, Ms. Carrington was late to work while she secured child care for her daughter, who had pneumonia. Ms. Carrington had given timely and proper notice to Ms. Bowman of her need to be late. On October 22 and 25, Ms. Carrington clocked in later than usual because she had been in class, but she had prior approval to arrive late. Ms. Carrington was then tardy for personal reasons on October 26, November 1, 9, and 11, and December 1 and 3.

The employer had provided prior reprimands for unscheduled absences, but not of prior tardiness. The prior reprimands for unscheduled absences had resulted in a one-day suspension in October 2010.

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).

Sticking just with the tardiness issue, the weight of the evidence in the record establishes excessive unexcused absences. The evidence establishes unexcused tardiness on the following dates: July 7, 8, 14, and 15, September 2, 14, 16, and 21, October 14, 18, and 26, November 1, 9, and 11, December 1 and 3, and finally on January 7 and 11. The evidence indicates that Ms. Carrington was specifically warned that she faced discharge from the employment if she incurred two more tardies. The evidence indicates Ms. Carrington had earlier been reprimanded for other attendance matters.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Carrington was discharged for misconduct. Accordingly, Ms. Carrington is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Carrington.

DECISION:

The Agency representative's February 2, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs