

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHERINE J BENEDICT
Claimant

APPEAL NO. 07A-UI-03457-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CIGARETTE OUTLET INC
Employer

**OC: 02/25/07 R: 04
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Cigarette Outlet filed a timely appeal from the March 30, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 19, 2007. Claimant Katherine Benedict participated and presented additional testimony through Shawna Virgil. Supervisor Debra Snyder represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, 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: Katherine Benedict was employed by Cigarette Outlet as a full-time store manager from August 4, 2003 until February 28, 2007, when Supervisor Debra Snyder discharged her for attendance. Ms. Benedict managed the Fort Madison store. Ms. Benedict's immediate supervisor was Debra Snyder, who oversaw 15 of the employer's stores. Ms. Benedict's regular working hours were 7:00 a.m. to 4:00 p.m., Monday through Friday.

The employer has a written attendance policy that appears in an employee handbook. The policy required Ms. Benedict to telephone Ms. Snyder at least two hours prior to the scheduled start of her shift if she needed to be absent. The employer deemed a single "no call, no-show" a dischargeable offense. Ms. Benedict was aware of the policy.

At 8:00 a.m. on February 26, 2007, Ms. Benedict notified Ms. Snyder that she was not feeling well and needed to go home. Ms. Snyder said, "Jesus Christ," and asserted that Ms. Benedict had taken a lot of time off. Ms. Benedict's most recent absence had occurred two weeks prior, when Ms. Benedict was absent for three hours to have a tooth pulled and had properly notified

the employer of the absence. Ms. Benedict's most recent absence for something other than illness properly reported to the employer had occurred in September 2006. Ms. Snyder begrudgingly approved Ms. Benedict's request to leave work early on February 26, but required Ms. Benedict to stay at the store until she completed the cigarette order. Ms. Benedict ended up leaving the store at 10:00 a.m. Ms. Benedict then went to a doctor and the doctor diagnosed Ms. Benedict with pneumonia. The doctor provided Ms. Benedict with a medical excuse that released her from work for the rest of the week. Ms. Benedict did not immediately provide the employer with her medical excuse. Ms. Benedict was scheduled to work on February 27, but did not report for work or notify Ms. Snyder that she would be absent. During the evening of the 27th, Ms. Benedict took her written medical excuse to the Fort Madison store and left it on the desk in the office. On February 28, Ms. Benedict was again scheduled to work, but did not report for work or telephone Ms. Snyder to say that she would be absent. At the beginning of the business day on February 28, the assistant store manager and Ms. Snyder saw Ms. Benedict's written medical excuse. At 9:30 or 10:00 a.m. on February 28, owner Mike Gripp contacted Ms. Benedict at her home and asked Ms. Benedict whether she had quit the employment. Ms. Benedict advised Mr. Gripp that she had not quit, but had been sick with pneumonia and needed to be off work for the rest of the week.

Ms. Benedict subsequently learned that that Ms. Snyder had placed someone else in the manager position at the Fort Madison store. On March 2, Ms. Benedict called Ms. Snyder to inquire about the changes that had been made at the store. Ms. Snyder informed Ms. Benedict that she had discharged Ms. Benedict on February 28, for being a "no-call, no-show" on two days.

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).

The evidence in the record establishes Ms. Benedict's absences on February 27 and 28 were both unexcused absences. The absences were due to illness, but Ms. Benedict failed to properly notify the employer. The fact that Ms. Benedict was well enough to travel to the doctor on February 26 indicates that she was well enough at that time to telephone Ms. Snyder to advise that she would be absent on February 27. The fact that Ms. Benedict was well enough on the evening of February 27 to take her medical excuse to the Fort Madison store indicates she was well enough to telephone Ms. Snyder to advise that she would be absent on February 28. The employer did not provide sufficient evidence to establish any additional unexcused absences. Though Ms. Benedict's absences on February 27 and 28 were unexcused under the applicable law, the evidence indicates that the employer knew on February 26 that Ms. Benedict had gone home sick and the employer knew at the beginning of business on February 28 that Ms. Benedict had pneumonia and needed to be off for the remainder of the week. The evidence indicates that Ms. Snyder had unreasonably harangued Ms. Benedict on February 26 with regard to Ms. Benedict's need to go home sick. The

evidence indicates that Ms. Benedict was indeed ill during the subsequent days and avoided contact with Ms. Snyder in order to avoid further conflict. Under the particular circumstances of this case, the administrative law judge finds that Ms. Benedict's unexcused absences were not excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Benedict was discharged for no disqualifying reason. Accordingly, Ms. Benedict is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Benedict.

DECISION:

The Agency representative's March 30, 2007, 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/kjw