

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENDRA A BARNES
Claimant

APPEAL NO. 14A-UI-04335-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THOMAS L CARDELLA & ASSOCIATES INC
Employer

OC: 04/06/14
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Admin. Code r. 871 – 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Kendra Barnes filed a timely appeal from the April 23, 2014, reference 01, decision that disqualified her for benefits. After due notice was issued, a hearing was held on May 14, 2014. Ms. Barnes participated. Geoffrey Hermsen represented the employer and presented testimony through Dylan Hutton.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kendra Barnes was employed by Thomas L. Cardella & Associates, Inc., as a full-time telephone service representative from November 2013 until April 3, 2014, when the employer discharged her for attendance. Ms. Barnes usually worked Tuesday through Saturday. The final absence that triggered the discharge occurred on March 21, 2014 and came to a supervisor's attention that same day. The employer assigned a particular employee to track attendance matters. That person was on vacation until March 23, 2014. The employer waited until April 3, 2014 to notify Ms. Barnes that the March 21, 2014 absence could and would result in her discharge from the employment. Ms. Barnes had continued to report for work in the interim. The employer's notice to Ms. Barnes on April 3 that she could and would be discharged in connection with the March 21 absence immediately followed Ms. Barnes discussion with the employer about returning to work hours she had enjoyed until recently. The employer considered additional earlier absences when making the decision to discharge the claimant 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

The evidence in the record fails to establish a current act. The final incident that triggered the discharge came to the employer's attention on March 21, 2014, the date of the final absence. The employer delayed notification to Ms. Barnes that the absence could or would result in her discharge from the employment until April 3, 2014. The employer's delay was unreasonable. Ms. Barnes request to return to her previous work hours appears to have been a factor in the timing of the discharge.

Because the discharge was not based on a current act, the discharge cannot serve as a basis for disqualifying Ms. Barnes for benefits. Because the discharge was not based on a current act, the administrative law judge need not consider whether the final incident, or any early incident, involved misconduct. Ms. Barnes is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's April 23, 2014, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css