

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WENDY R ROBINSON**  
Claimant

**APPEAL NO. 09A-UI-02316-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BICKFORD SENIOR LIVING GROUP LLC**  
Employer

**Original Claim: 01/04/09  
Claimant: Appellant (2-R)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(8) – Current Act Requirement

**STATEMENT OF THE CASE:**

Wendy Robinson filed a timely appeal from the February 10, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 11, 2009. Ms. Robinson participated. Kathy Dye, Acting Director and Division Operations Specialist, represented the employer.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her 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: Wendy Robinson was employed by Bickford Senior Living Group as a Certified Nursing Assistant from April 9, 2008 until January 6, 2009, when Director Christina Bricker discharged her for attendance. The final absence that prompted the discharge occurred on December 21, 2008, when Ms. Robinson was absent due to a lack of childcare. Ms. Bricker was out of town on December 21. Ms. Robinson reported the absence to the scheduler, Kay Riley. When Ms. Robinson spoke with Ms. Riley, Ms. Riley told Ms. Robinson that she was taking her off the schedule for the week and that Ms. Robinson would need to speak with Ms. Bricker when she returned. Ms. Robinson was only scheduled to work one other shift that week, on December 26, so this was the shift Ms. Riley canceled.

On January 6, Ms. Bricker met with Ms. Robinson for the purpose of discharging her from the employment for attendance. In making the decision to discharge Ms. Robinson, Ms. Bricker considered prior absences and reprimands. Ms. Robinson had been tardy on November 19 and absent from her shift on November 22, 2008 due to a lack of childcare. Ms. Bricker had formally reprimanded Ms. Robinson after these absences and had warned that additional absences could leave to discharge 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.

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).

The administrative law judge notes that the employer's witness lacked any personal knowledge of Ms. Robinson's employment. The administrative law judge further notes that the employer had the

ability to present testimony through Ms. Bricker and/or Ms. Riley, but elected not to present such testimony.

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 weight of the evidence fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). The evidence indicates that the final absence that prompted the discharge occurred on December 21 and came to the attention of the employer on that day. The weight of the evidence indicates that the employer waited until January 6, 2009 to notify Ms. Robinson that the December 21 absence subjected her to possible or actual discharge from the employment. The administrative law judge concludes that the employer's 17-day delay between these two events caused the December 21 absence to no longer constitute a current act at the time the employer notified Ms. Robinson on January 6 that the absence subjected her to possible or actual discharge from the employment. Because the discharge was not based on a current act, the administrative law judge concludes that Ms. Robinson was discharged for no disqualifying reason. Because there was no current act, the administrative law judge need not consider whether the absence was excused or unexcused and need not consider any of the prior attendance matters. See 871 IAC 24.32(8). Ms. Robinson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Robinson.

The evidence regarding Ms. Robinson's limited availability for work and child care issues raises the question of whether Ms. Robinson has been available for work since she established her claim for benefits. This matter will be remanded to the Claims Division for determination of that issue.

**DECISION:**

The Agency representative's February 10, 2009, reference 01 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 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

jet/kjw