

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NATALIE A STEVENS**  
Claimant

**APPEAL NO. 07A-UI-06475-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EVANGELICAL FREE CHURCH HOME**  
Employer

**OC: 06/10/07 R: 02  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Natalie Stevens filed a timely appeal from the June 27, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 17, 2007. Ms. Stevens participated. Nan Sloan, Administrator, represented the employer.

**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: Natalie Stevens was employed by Evangelical Free Church Home as a full-time licensed practical nurse from May 29, 2007 until June 7, 2007, when Nan Sloan, Administrator, and Michelle Reiff, Director of Nursing, discharged her. Ms. Stevens was assigned to the overnight shift, 10:00 p.m. to 6:00 a.m. Ms. Stevens has been a nurse for five years prior to commencing the employment. Ms. Stevens left her June 5-6 shift early without approval. Ms. Stevens had appeared for her shift at 9:50 p.m. and had a disagreement with the nurse assigned to train her regarding whether Ms. Stevens was on time or late for her shift. Ms. Stevens had missed the shift change report. Ms. Stevens and the training nurse had additional disagreements during the shift. Ms. Stevens concluded that the training nurse was asking her to perform work for which she had not been properly trained. Ms. Stevens left at 2:00 a.m. Ms. Stevens did not contact anyone in a supervisory position to discuss her concerns or to get approval for the early departure. Ms. Stevens did not know how many residents she was leaving in the training nurse's care. Ms. Stevens was a "no-call/no-show" for her June 6-7 overnight shift. Ms. Stevens contacted the Director of Nursing. Ms. Stevens had taken depression and sleep medication, had not set her alarm, and had slept through her June 6-7 shift. Ms. Stevens contacted the Director of Nursing at 12:15 p.m. on June 7. At that time, Ms. Stevens asked the Director of Nursing whether she, Ms. Stevens, had been at work the night before because Ms. Stevens did not know whether she had appeared for work. After this conversation ended, the Director of Nursing called Ms. Stevens and told her not appear for her June 7-8 shift, but to appear for a meeting with the nursing home administrator on June 8.

Ms. Stevens appeared for the meeting on June 8. Prior to the meeting, Ms. Stevens reviewed the posted schedule and saw that she had been removed from the schedule. During the meeting, Ms. Stevens referenced that a fight with her boyfriend had prompted her to take additional prescription medication on June 6. The employer presented Ms. Stevens with a written termination document, which Ms. Stevens refused to read or sign. The employer based its decision to discharge Ms. Stevens on its concern for the elderly residents in its care and concern that Ms. Stevens would not provide appropriate care to those residents.

The employer did not have a policy that addressed Ms. Stevens' off-duty conduct.

#### **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). A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992) the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Court found misconduct. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

The evidence establishes that Ms. Stevens left work early without approval half way through her June 5-6 overnight shift. This was an unexcused absence under the applicable law. The evidence establishes that Ms. Stevens was a "no-call/no-show" for her June 6-7 shift. This was also an unexcused absence under the applicable law. Though it was within the discretion of the employer to discharge Ms. Stevens from the employment, the administrative law judge concludes that Ms. Stevens' two unexcused absences did not amount to excessive unexcused absences and would not disqualify Ms. Stevens for unemployment insurance benefits. The administrative law judge further concludes that Ms. Stevens' off-duty conduct, in the absence of an employer policy regarding off-duty conduct, would not disqualify Ms. Stevens for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Stevens was discharged for no disqualifying reason. Accordingly, Ms. Stevens is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Stevens. However, the employer is not a base period employer and will not be assessed for benefits paid to Ms. Stevens during the current benefit year that started on June 10, 2007 and will end on June 9, 2008. Thereafter, the employer will only be assessed for benefits paid to Ms. Stevens if Ms. Stevens establishes a new claim, if

Ms. Stevens is eligible for benefits, and if the employer at that time falls within the base period of employment. If the employer is assessed for benefits, the assessment will be commensurate with the small amount of total wages Ms. Stevens earned during the short period of employment.

**DECISION:**

The Agency representative's June 27, 2007, reference 01, decision is reversed. The claimant is eligible for benefits, provided she meets all other eligibility requirements. 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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