

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEGAN O DANIELS

Claimant

APPEAL NO. 10A-UI-12576-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOUNTAIN WEST HEALTH CENTER INC

Employer

OC: 08/08/10

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 2, 2010, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on October 6, 2010. Claimant participated. Joyce Giesking represented the employer. The administrative law judge took official notice of the documents submitted for or generated in connection with the fact-finding interview.

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: Megan Daniels was employed by Fountain West Health Center as a full-time Certified Nursing Assistant from June 2008 until August 10, 2010, when Joyce Giesking, Director of Nursing, discharged her for attendance. Ms. Daniels was assigned to the 6:00 a.m. to 2:00 p.m. shift. The final incident that triggered the discharge was Ms. Daniels' tardiness on August 8, 2010. On that day, Ms. Daniels was late because she overslept.

The employer's absence reporting policy required that Ms. Daniels telephone the employer personally at least two hours prior to her shift and speak to a charge nurse if she needed to be absent from work. Ms. Daniels was aware of this policy.

In making the decision to discharge Ms. Daniels from the employment, the employer considered prior absences and instances of tardiness. From July 7, 2009 until August 6, 2009, Ms. Daniels was on an approved leave of absence based on a non-work-related injury. On October 2, 2009, Ms. Daniels was absent due to illness and notified the employer less than two hours prior to the scheduled start of her shift. On October 3, Ms. Daniels was absent due to illness properly reported. Ms. Daniels was also absent due to illness properly reported on October 22, 25, 26, November 11, 14, December 16, 18, January 5, 26, 27, 28, 29, February 1, 12, 21, 23, March 8, 9, 25, April 7, 8, May 1, and June 22, 30, July 1, 7, 11, 12. Ms. Daniels had been late for

personal reasons on November 12, February 7, 9, 10, 19, March 21, and July 5, and 9. On February 3, Ms. Daniels was absent so that she could visit her grandfather in the hospital. On March 6, Ms. Daniels was absent due to illness, but did not personally notify the employer. This was not the incident where Ms. Daniels was without a voice. On December 29, Ms. Daniels was absent due to inclement weather. There was a travel advisory and the interstate Ms. Daniels had to take to get to work was closed. Ms. Daniels provided proper notice to the employer.

Ms. Daniels' absences occurred in the context of multiple warnings issued for attendance.

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 unexcused absences on the following dates: October 2, November 12, February 3, 7, 9, 10, 19, March 6, 21, July 5, 9 and August 8, 2010. These absences all occurred in the context of reprimands for attendance. The balance of Ms. Daniels’ absences were excused absences under the applicable law. Taking into consideration only those absences deemed unexcused under the applicable law, the evidence establishes excessive unexcused absences. Ms. Daniels was discharged for misconduct. Accordingly, Ms. Daniels 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. Daniels.

DECISION:

The Agency representative’s September 2, 2010, 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