

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GABRIELLE A FORD
Claimant

APPEAL NO. 10A-UI-01560-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

OC: 12/27/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 19, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 13, 2010. Claimant Gabrielle Ford provided a telephone number for the hearing, but was not available at that number at the time set for the hearing. Attorney Ross Gardner represented the employer and presented testimony through Amber Matthai. Exhibits One through Eleven were received into evidence.

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: Gabrielle Ford was employed by Ameristar Casino Council Bluffs as a full-time guest service agent (front desk clerk) from October 2008 until December 26, 2009, when supervisor Amber Matthai suspended her for attendance. Ms. Matthai and Jamie Klein were Ms. Ford's supervisors. Ms. Matthai notified Ms. Ford on December 26, 2009, that the employer was ending the employment. Though the employer refers to the situation as a quit, it is clear that the employer discharged Ms. Ford for attendance.

The employer had a written attendance policy that required Ms. Ford to notify her supervisor(s) at least two hours before the scheduled start of her shift if she needed to be absent. Ms. Ford was aware of the policy.

The final absence that prompted the suspension and discharge occurred on December 25, 2009, when Ms. Ford was absent and failed to properly notify the employer. The employer deemed this absence especially egregious because it occurred on a holiday. The employer assigned additional "occurrence points" to absences that fell on holidays or other peak business times. In making the decision to end the employment, the employer considered Ms. Ford's late arrivals on December 3 and 10. The employer also considered Ms. Ford's early departure from

her shift on November 5. On that day, Ms. Ford spoke to Ms. Klein about her need to leave work early. Ms. Klein did not document the basis for the early departure and cannot recall the reason for the early departure. The employer considered Ms. Ford's absence on October 4. On that day, Ms. Ford notified the employer at least two hours prior to the scheduled start of the shift that she needed to be absent. The employer did not document and cannot recall the basis for the absence. The employer also considered Ms. Ford's absence on August 3, 2009. On that day Ms. Ford was absent for her scheduled shift and required training that was to occur during her scheduled shift. Ms. Ford notified the employer less than two hours prior to the scheduled start of her shift that she needed to be absent because her child was ill.

On November 9, 2009 and December 18, 2009, the employer issued reprimands to Ms. Ford regarding her absences and provided several additional notices to Ms. Ford to let her know where she stood on the employer's attendance point system.

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 weight of the evidence establishes an unexcused absence on December 25, 2009, when Ms. Ford was absent and failed to properly notify the employer. The evidence establishes unexcused tardiness on December 3 and 5. The evidence establishes an unexcused absence on August 3, when Ms. Ford was absent due to her child's illness, but provided less than two hours notice to the employer. Because of the employer's lack of documentation, there is insufficient evidence in the record to establish any additional unexcused absences. Based on the particular facts in evidence, the administrative law judge concludes that Ms. Ford's unexcused absences were not excessive for the purpose of determining her eligibility for unemployment insurance benefits. The administrative law judge would agree with the employer that an absence on a peak business day, such as Christmas, would be more significant than an absence on a slower day. But despite that particular absence, one has to go back to August to find another full-day unexcused absence, and then that particular absence was based on the need to care for a sick child. While the evidence does indicate two instances of unexcused tardiness at the start of December, those two incidents do not indicate a pattern of unexcused tardiness. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ford was discharged for no disqualifying reason. Accordingly, Ms. Ford is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Ford.

DECISION:

The Agency representative's January 19, 2010, 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/css