

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER S UNG

Claimant

APPEAL NO. 10A-UI-17678-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL

Employer

OC: 11/28/10

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 December 21, 2010, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on February 10, 2011. Claimant participated. Carey Seger, Senior Human Resources Business Partner, represented the employer. Exhibits One through Four 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: Jennifer Ung was employed by Mercy Hospital House Mercy Medical Clinic as a full-time secretary/receptionist from July 2009 until November 30, 2010, when Todd Beveridge, Director of House of Mercy, and Carey Seger, Senior Human Resources Business Partner, discharged her for attendance and unsatisfactory work performance.

The final incident that prompted the discharge was Ms. Ung's absence on November 30, 2010. Ms. Ung had previously requested the time off so that she could undergo a medical procedure. Mr. Beveridge was Ms. Ung's immediate supervisor and had approved the request for time off. As part of the request, Ms. Ung had taken appropriate steps to secure a temporary worker to cover her shift. On November 29, Ms. Ung had left work early at 1:15 p.m. because she was sick and needed to go to the doctor. Ms. Ung had a prior understanding with Mr. Beveridge that it was okay to leave in such circumstances so long as she had someone to cover her duties. Before Ms. Ung departed, she made certain that one or more coworkers were available to fulfill her duties while she was gone.

In making the decision to end Ms. Ung's employment, the employer considered prior attendance and performance matters.

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 fails to establish a current act of misconduct. The employer failed to present testimony from Mr. Beveridge or anyone else with personal knowledge concerning the final absence on November 30, 2010 that triggered the discharge or the next most recent absence on November 29, 2010. The employer had the ability to present such testimony, but elected not to. The weight of the evidence indicates that Ms. Ung was absent for part of November 29 and all of November 30, 2010 due to illness. The weight of the evidence establishes that Ms. Ung had prior approval for the November 30, 2010 absence and that she followed established procedures in connection with her early departure on November 29, 2010. The employer had failed to provide sufficient evidence, and sufficiently direct and satisfactory evidence, to establish that either absence was an unexcused absence under the applicable law. Because there is insufficient evidence to establish unexcused absences on November 29 and 30, there is insufficient evidence to establish a current act of misconduct. Because there is no current act of misconduct, there can be no disqualification for benefits, and there is no need for the administrative law judge to consider the prior attendance or performance matters.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ung was discharged for no disqualifying reason. Accordingly, Ms. Ung is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Ung.

DECISION:

The Agency representative's December 21, 2010, reference 03, 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