

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICOLE BOONE**  
Claimant

**APPEAL NO. 17A-UI-03360-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PENN CENTER INC**  
Employer

**OC: 06/05/16**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Nicole Boone filed a timely appeal from the March 21, 2017, reference 06, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Boone was discharged on January 25, 2017 for failure to follow instructions in the performance of her job. After due notice was issued, a hearing was started on April 20, 2017 and completed on April 21, 2017. Claimant Nicole Boone participated. Jackie Smith Duggan represented the employer and presented additional testimony through Shelly Hendryx. Exhibits 1, 4, 5, 6, 8, 10, 11 and A 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: Penn Center, Inc. provides home and community-based support services to adults suffering from mental illness. Nicole Boone was employed by Penn Center as a full-time Director Support Professional from August 2016 until January 26, 2017, when Jackie Smith Duggan, Director of Community Based Services, discharged her for attendance. Ms. Boone was assigned to the overnight shift. Ms. Boone's shift would begin at 11:00 p.m. and end at 7:00 a.m. Ms. Boone performed her work duties at two residences in Marion. Four clients resided in one of the homes. Five clients resided nearby in the other home. Ms. Boone's overnight duties included assisting the clients with mental health issues, sleep issues, access to medications, resolving roommate disagreements and documenting the services she provided. Ms. Boone's immediate supervisor was Terry Fehring, Program Coordinator. If Ms. Boone needed to be absent from work, the employer's attendance policy required that Ms. Boone telephone the designated after-hours on-call staff at least two hours prior to her shift. The designated on-call staff person would be a program coordinator, a site leader or a director. The on-call staff person would be assigned to answer such calls for a week at a time and would send a broadcast email to supervisors and administrators at the end of that week documenting after-hours issues that

arose including employee absences. The employer reviewed the absence reporting policy with Ms. Boone at the start of her employment.

Ms. Boone last performed work for the employer during a shift that started on January 23, 2017 and that ended on the morning of January 24. The final absence that triggered the discharge occurred on January 24, 2017, when Ms. Boone failed to report for work at 11:00 p.m. and had given no notice to the employer that she would be absent from the shift. At 11:17 p.m., Ms. Fehring attempted to contact Ms. Boone. When Ms. Boone did not answer, Ms. Fehring left a message asking for a return call. Ms. Boone did not return the call. On January 25, the employer notified Ms. Boone not to report for her shift that evening. On January 26, 2017, Shelly Hendryx, Associate Director of Community Based Services, notified Ms. Boone that she was discharged.

The employer's decision to discharge Ms. Boone followed a January 20, 2017 meeting that included Ms. Boone, Ms. Hendryx and Ms. Fehring. At the meeting, the employer addressed recent no-call/no-show absences that included a no-call/no-show absence on January 17, 2017. During the meeting, Ms. Boone expressed interest in moving to another shift, but ultimately expressed that the overnight shift worked best with her family responsibilities.

In making the decision to discharge Ms. Boone from the employment, the employer considered several prior absences dating from September 12, 2016. On that date and on October 6, November 21, November 27, November 28, and December 30, 2016, Ms. Boone was absent due to illness and properly reported the absence to the employer. On October 30, 2017, Ms. Boone reported her need to be absent to care for her ill daughter, but provided the notice via text message. The on-call staff person immediately called Ms. Boone in response to the text message and reminded her that text messages were not an accepted form of notice. During the call, Ms. Boone spoke with the on-call staff and provided appropriate and timely notice of her need to be absent to care for her sick daughter. On November 26, 2016, Ms. Boone was absent without notifying the employer. On the next day, Ms. Boone notified the employer that she had been ill and provided notice of her need to be absent on November 27. On December 11, 2016, Ms. Boone was absent because she lacked transportation to and from work. Ms. Boone had allowed her 20 year old son to drive her car to Iowa City and her son had ended up in the ditch with the car. Between 6:00 and 7:00 p.m., Ms. Boone notified the employer that she would be absent from the shift. Ms. Boone did not attempt to secure alternate transportation to work. On December 26 and 27, 2016, Ms. Boone was absent for personal reasons. Ms. Boone did not provide a reason for these two absences when she reported the absences. On January 6, 2017, Ms. Boone was absent because her daughter had just begun her first menstrual cycle and needed Ms. Boone's support. Ms. Boone properly reported the absence. On January 10, 2017, Ms. Boone was absent without notice to the employer. On January 16, Ms. Boone was absent for personal reasons and properly notified the employer.

In making the decision to discharge Ms. Boone from the employment, the employer considered a verbal warning issued to Ms. Boone on November 26, another verbal warning issued on January 2 and a written warning issued to Ms. Boone as part of the meeting on January 20, 2017.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The weight of the evidence in the record establishes excessive unexcused absences. The administrative law judge found the employer's documentation of the absences, generated at the time the absences occurred, more reliable evidence than Ms. Boone's recollection of the absences months after they occurred. The weight of the evidence establishes a no-call/no-show absence on January 24, 2017. That absence was preceded by another no-call/no-show absence on January 17, 2017 and a meeting on January 20, 2017 at which time Ms. Boone conceded that the January 17 absence had been for personal reasons and not based on illness. The weight of the evidence establishes additional unexcused absences. These included a no-call/no-show absence on November 26. The December 11 absence due to a lack of transportation was properly reported, but was an unexcused absence because ensuring transportation to the employment was a matter of personal responsibility. Ms. Boone knew at least four hours prior to the scheduled start of her shift that she would be without her car. Ms. Boone had a reasonable opportunity to arrange an alternative form of transportation, but did not do that. The weight of the evidence establishes additional unexcused absences on December 26 and December 27 when Ms. Boone was absent for personal reasons. On January 10, Ms. Boone had another no-call/no-show absence. The weight of the evidence fails to support Ms. Boone's assertion that the absence was attributable to her daughter's menstrual issues. Ms. Boone had already missed a shift four days earlier to deal with onset of her daughter's menstrual cycle. On January 16, Ms. Boone was again absent for personal reasons. Ms. Boone's absences occurred in the context of warnings from the employer regarding Ms. Boone's attendance. The weight of the evidence indicates that Ms. Boone did not want to be on the overnight shift and on several occasions elected not to appear for scheduled shifts.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Boone was discharged for misconduct. Accordingly, Ms. Boone is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Boone must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

#### **DECISION:**

The March 21, 2017, reference 06, disqualification decision is affirmed, though the basis for the discharge is corrected to excessive unexcused absences. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment

benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs