

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NANCY C REDDING**  
Claimant

**APPEAL NO. 13A-UI-111987-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARVEYS BR MANAGEMENT CO INC  
HARVEYS CASINO RESORTS**  
Employer

**OC: 09/22/13  
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 October 14, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 18, 2013. Claimant Nancy Redding participated. Pixie Allan from Equifax represented the employer and presented testimony through Vicki Broussard. Exhibits One through Five 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: Nancy Redding was employed by Horseshoe Council Bluffs as a part-time poker dealer until September 16, 2013, when the employer discharged her for attendance. The employer's written attendance policy required that Ms. Redding notify the employer no less than two hours prior to the shift if she needed to be absent. Ms. Redding was aware of the policy.

The final absence that triggered the discharge occurred on September 14, 2013, when Ms. Redding was absent due to illness. Ms. Redding was start working at 10:00 a.m. that day. The employer's policy required that Ms. Redding be at the work place 15 minutes before her scheduled start time. The employer's attendance policy required that Ms. Redding appear 30 minutes before that if she needed to request to leave early that day. Ms. Redding was suffering from diarrhea that day. Ms. Redding left home with sufficient time to get to the workplace by 9:15 a.m. so that she could request to leave early that day. As Ms. Redding was on her way to the work place, Ms. Redding had a gastro-intestinal accident in her work uniform and had to return home to bathe and change out of her dirty clothes. Ms. Redding decided she should not go to work in her condition. Ms. Redding was concerned that she might have another similar accident while working on the casino floor. When Ms. Redding worked on the casino floor, she could only leave her post unless another dealer came to her dealer post to tap

her out take her place. Ms. Redding notified the employer just as soon as she had finished bathing, but not at least two hours prior to the shift.

Ms. Redding was next scheduled to work on September 16, 2013. Ms. Redding appeared for that shift and was discharged from the employment.

The next most absence that factored in the discharge occurred on August 13, 2013. The employer considered earlier absence in making the decision to discharge Ms. Redding from the employment.

## **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). 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 evidence in the record establishes that the final absence on September 14, 2013 was an excused absence under the applicable law. The evidence establishes circumstances beyond Ms. Redding’s control that prevented her from providing the employer with at least two hours’ notice that she needed to be absent from the employment. Ms. Redding notified the employer of her need to be absent just as soon as she had addressed the more immediate hygiene problem. Ms. Redding’s actions, including the timing of her notice to the employer, were reasonable under the circumstances. The next most recent absence that factored in the discharge occurred a month before the final incident that triggered the discharge. The evidence fails to establish a current act of misconduct. Because there was no current act of misconduct, the administrative law judge need not further consider the earlier absences and whether they were excused or unexcused absences under the law.

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

**DECISION:**

The agency representative's October 14, 2013, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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