

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CARIE J SPITTLER**  
Claimant

**APPEAL NO. 11A-UI-11335-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THOMAS L CARDELLA & ASSOCIATES INC**  
Employer

**OC: 07/24/11  
Claimant: Respondent (!)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from a representative's decision dated August 18, 2011, reference 01, which held the claimant eligible to receive unemployment insurance benefits, finding the claimant's dismissal was not for a current act of misconduct. After due notice was issued, a telephone hearing was held on September 22, 2011. The claimant participated personally. The employer participated by Ms. Jamie Cooper, attorney at law, and witness Ms. Cory Symmonds, supervisor. Employer's Exhibits One, Two, and Three were received into evidence.

**ISSUE:**

At issue is whether the claimant was discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Carie Spittler was employed by Thomas Cardella & Associates from August 8, 2010, until her discharge on July 20, 2011. Ms. Spittler worked as a full-time telephone sales representative and was paid by the hour. Her immediate supervisor was Cory Symmonds.

Ms. Spittler was discharged on July 20, 2011, when the employer concluded that her previous absence on June 23, 2011, was not excusable and therefore concluded the claimant had exceeded the maximum number of attendance infractions allowed under company policy.

On June 22, 2011, the claimant had contacted her immediate supervisor and had indicated that she was traveling with her father-in-law and family members to Iowa City, Iowa, where the claimant's father-in-law was to undergo emergency transplant surgery. The claimant's absence was authorized by her supervisor. The next day, Ms. Spittler provided a doctor's note indicating that it was necessary for her to be absent because of the scheduled surgery. Ms. Spittler also informed the employer that due to a last-minute decision by the medical staff, the transplant had not been accomplished.

The claimant was allowed to continue working for almost a month before the employer retroactively decided the claimant's absence on June 23, 2011, should not have been excused and a decision was made to terminate the claimant from employment. During the period between June 23, 2011, and July 20, 2011, the claimant had been authorized to be away from work by the company and the company had indicated that the claimant might be promoted based upon her good work. Ms. Spittler had been allowed to be absent from work and to return on a number of occasions during the final month of her employment before being informed that she was being discharged for an incident that had taken place some weeks before.

It is the employer's position that the delay in the claimant's discharge was occasioned by management at the location where she worked attempting to save the claimant's job position, but upper management subsequently decided the claimant should have been discharged.

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

The question before the administrative law judge is whether the evidence in the record establishes a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 may not necessarily be serious enough to warrant the 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 App. 1992). A discharge for misconduct cannot be based upon past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The Iowa Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that excessive unexcused absenteeism is a form of misconduct. The Court held, however, that the absences must both be excessive and unexcused and that absences due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In the case at hand, Ms. Spittler properly notified her employer of the medical necessity that she be absent on June 23, 2011, and her absence was excused by her immediate supervisor. The claimant subsequently provided a doctor's note indicating that her attendance at the medical procedure was required. The medical transplant procedure was not completed on June 23, 2011, because medical personnel determined at the last minute that the organ to be transplanted was too diseased for the procedure to take place. The claimant, at that time, was in Iowa City, Iowa, and would not have been able to return to work that day based upon the time that she was informed that the transplant would not take place. The administrative law judge thus concludes that the claimant's last absence was for medical reasons and properly reported.

The second issue before the administrative law judge is whether the claimant was discharged for a current act of misconduct. She was not.

The employer was aware of the circumstances surrounding Ms. Spittler's absence within one day of the June 23 date that the absence occurred. The claimant was allowed to continue to work and performed services for the company for almost one month before a retroactive decision was made to terminate her for her absence on June 23, 2011. The claimant's discharge on July 20, 2011, therefore, was not for a current act of misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated August 18, 2011, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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