

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARJORIE M SPEIRS
Claimant

APPEAL NO. 10A-UI-14279-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 09/05/10
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 6, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 30, 2010. Claimant participated. Tom Kuiper of Talx represented the employer and presented testimony through Jonathan Moe and Joe Leekley.

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: The employer operates Correctionville Nursing & Rehab. Marjorie Speirs was employed by Care Initiatives as a cook from 2003 until August 18, 2010, when Jonathan Moe, Administrator, discharged her from the employment. Joe Leekley, Dietary Services Manager, was Ms. Speirs' immediate supervisor during the relevant period of the employment.

Prior to November 11, 2009, Ms. Speirs had been a regular part-time employee. At the end of October 2009, Ms. Speirs underwent heart surgery that rendered her at least temporarily unable to work. Ms. Speirs had exhausted all paid leave benefits and was not eligible for leave under the family and medical leave act. To keep Ms. Speirs as an employee, the parties agreed that Ms. Speirs would become an on-call employee and would let the employer know when she was able to return to work. Ms. Speirs continued to be a part-time, on-call employee—or “casual” employee—until August 18, 2010. Under the casual employment arrangement, Ms. Speirs was not guaranteed any hours and was expected to request hours on the schedule if she wanted to work. The employer would also contact Ms. Speirs if the employer needed her assistance.

Ms. Speirs last performed work for the employer on February 26, 2010. Ms. Speirs later requested hours and was placed on the schedule to work on March 27, 28 and April 1. The employer mailed Ms. Speirs a copy of the work schedule. A week or two before the scheduled shifts, Ms. Speirs contacted the employer and said she could not work the shifts. Thereafter,

the employer did not attempt to give Ms. Speirs additional hours. Ms. Speirs did not take meaningful or effective steps to get additional hours until mid-August 2010.

In August 2010, Ms. Speirs contacted Mr. Leekley and requested to be placed on the schedule. Mr. Leekley told Ms. Speirs that he would need to check with Administrator Jonathan Moe first. Mr. Leekley reported back to Ms. Speirs that the employer had discharged her from the employment on August 18, 2010 for failing to work at least eight hours during a six-month period. The employer's casual work policy required that employees work that amount to continue in the casual employee status. Prior to this contact, Ms. Speirs had not said anything to the employer to indicate a desire to end her part-time on-call 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).

The weight of the evidence in the record establishes that the employer discharged Ms. Speirs from her part-time on-call employment on August 18, 2010. The basis for the discharge was the employer's casual employment policy, which obligated Ms. Speirs to work 8 hours during a six-month period. The administrative law judge notes that Ms. Speirs had last worked for the employer on June 26, 2010 and that she had worked four hours on that date. The administrative law judge notes that the employer discharged Ms. Speirs from the employment on August 18, 2010. This was less than six months from the last day Ms. Speirs had worked. Ms. Speirs had fulfilled half of the 8-hour minimum work requirement. At the time Ms. Speirs contacted the employer in mid-August 2010, there was still time for her to satisfy the minimum work hour requirement. The employer had already discharged Ms. Speirs and was not willing to allow her to work additional hours that would fulfill the minimum work hour requirement. The evidence establishes no misconduct based on the alleged failure to work the minimum number of hours.

To the extent that the absences on March 27, 28 and April 1 factored into the discharge, none of these was a current act of misconduct. Thus, these absences cannot serve as a basis for disqualifying Ms. Speirs for unemployment insurance benefits.

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

The evidence calls into question whether Ms. Speirs has met the work ability and availability requirements of Iowa Code section 96.4(3) since she established the claim for benefits what was effective September 5, 2010. The matter will be remanded to the Claims Division so that those issues may be investigated and ruled upon.

DECISION:

The Agency representative's October 6, 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.

This matter is remanded to the Claims Division for investigation into and a ruling concerning whether the claimant has met the work ability and availability requirements of Iowa Code section 96.4(3) since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs