

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MAKELY, KELLY, K
Claimant

APPEAL NO. 12A-UI-14724-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**JENNIE EDMUNDSON MEMORIAL
HOSPITAL**
Employer

**OC: 11/11/12
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 6, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on January 17, 2013 and completed on February 12, 2013. Claimant participated. Donna Wellwood represented the employer and presented additional testimony through Teresa Stevens. The administrative law judge took official notice of the fact-finding materials and marked pages of those materials as Exhibits One through Five for identification purposes. Exhibit A was 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: Kelly Makely was employed by Jennie Edmundson Memorial Hospital as a full-time unit secretary from 2006 until November 14, 2012, when Teresa Stevens, Director of Intensive Care and Telemetry Service, discharged her from the employment. Ms. Stevens was Ms. Makely's immediate supervisor. Ms. Makely's work hours were 2:00 p.m. to 8:30 p.m.

The final incident that triggered the discharge occurred on November 13, 2012. On that day, Ms. Makely was assigned to be on call in case she was needed on her unit. At 1:30 p.m., Donna Holly of the nursing service office notified Ms. Makely that she was being placed on call. The employer paid Ms. Makely a nominal wage, \$2.00 per hour, to be on call. Despite knowing that she was on call, Ms. Makely went out to dinner with her father. Ms. Makely set her phone on vibrate mode. For that reason, Ms. Makely did not hear the employer's telephone call at 4:15 p.m. At 4:15 p.m., the employer left a message for Ms. Makely, directing her to call back because she was needed in the intensive care unit. The employer's established policy required that an on-call employee report for work within one hour of being notified that he or she was needed in the workplace. Ms. Makely was well aware of the policy.

At 4:20 p.m., Ms. Makely saw that she had missed a call from the employer. To return the call, Ms. Makely had to go through Methodist Hospital and the hospital would have to page the supervisor. At 4:40 p.m., Ms. Makely spoke to Karen Vroman, Administrative Coordinator. Ms. Makely asked if she was still needed at work and Ms. Vroman said yes. Ms. Makely explained that she was out to dinner with her father that she would have to go home and change clothes before she came in. Ms. Vroman reminded Ms. Makely that it had already been almost 30 minutes since the employer had notified her that she was being called into work.

Immediately after Ms. Makely got off the phone with Ms. Vroman, Ms. Makely telephoned the ICU and spoke to Charge Nurse Bonnie Hall. Ms. Makely asked Ms. Hall how busy the ICU was and whether she was still needed. Ms. Hall said the ICU had been busy. Ms. Hall told Ms. Makely, "Don't bother," that she had located someone else to come in. Ms. Makely told Ms. Hall that she needed to clarify that with Ms. Vroman and Ms. Hall said Ms. Vroman was standing next to her. Ms. Makely would still have had about 35 minutes left in her allotted one-hour response time.

The next day, Ms. Stevens discharged Ms. Makely from the employment. In making the decision to discharge Ms. Makely the employer considered prior incidents. The most recent prior incident had been Ms. Makely's absence due to illness on November 6, 2012. Ms. Makely had properly notified the employer of her need to be absent that day. The employer also considered earlier incidents wherein Ms. Makely was late or failed to use the timekeeping system in a timely manner to document her arrival at the workplace.

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).

As annoying as Ms. Makely's November 13 conduct likely was to the employer, the evidence fails to establish any violation of any work in connection with the events of that day. Ms. Makely was well within the one hour response time when the charge nurse told her not to bother to come in. The evidence fails to establish conduct rising to the level of misconduct in connection with the final incident that triggered the discharge. The next most recent incident that factor to the discharge occurred a week earlier and was an absence due to illness properly reported. In other words it was an excused absence under the applicable law and could not be used as a basis for disqualifying Ms. Makely for unemployment insurance benefits. See Iowa Admin. Code rule 871 IAC 24.32(7)(regarding discharges for misconduct based on excessive *unexcused* absences). The evidence fails to establish a current act of misconduct. For that reason, the administrative law judge concludes that Ms. Makely was discharged for no disqualifying reason. Ms. Makely is eligible for unemployment insurance benefits, provided she is otherwise eligible. The employer's account may be charged. Because the evidence fails to establish a current act, the administrative law judge need not consider the prior matters concerning late arrivals or failure to use the timekeeping system in a timely manner.

DECISION:

The Agency representative's December 6, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs