

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA D BLOMME
Claimant

APPEAL NO. 07A-UI-05803-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 05/06/07 R: 03
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the May 29, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 27, 2007. Claimant Sandra Blomme did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Attorney Lynn Corbeil of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Kristyn Vannevel, Director of Nursing, and Dorie Brennecke, Administrator. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits Two through 14 into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sandy Blomme was employed by Care Initiatives as a part-time Certified Nursing Assistant (C.N.A.) and restorative aide at Belle Plain Nursing and Rehab from August 14, 2001 until April 30, 2007, when Kristyn Vannevel, Director of Nursing, and Dorie Brennecke, Administrator, discharged her for attendance. The final absence that prompted the discharge occurred on April 27, 2007, when Ms. Blomme left work early to attend to her child. Ms. Blomme's six or seven-year-old son suffers from a seizure disorder and experiences frequent seizures. Ms. Blomme's early departure on April 27 was prompted by a call from the child's babysitter, who told Ms. Blomme that her son was "not acting right." Ms. Blomme spoke to the charge nurse on duty and informed the charge nurse of the need to leave to address the needs of her son. The employer's policy required Ms. Blomme to find a replacement if she needed to be absent. Ms. Blomme did not find a replacement before departing on April 27. Ms. Blomme frequently missed work due to the need to attend to her son. Ms. Blomme had received prior warnings for attendance based both on the absences attributable to her son's illness and to other personal matters.

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).

The greater weight of the evidence indicates that Ms. Blomme left work early on April 27 to address a report that her son was ill or "not acting right." The greater weight of the evidence indicates that Ms. Blomme reasonably concluded that she needed to leave to address her son's illness and that Ms. Blomme properly reported her need to be absent to the charge nurse. Under the circumstances, the employer's requirement that Ms. Blomme find a replacement before she leave the workplace was unreasonable. The administrative law judge concludes that the final absence that prompted the discharge was an excused absence under the applicable law. The evidence fails to establish a "current act" of misconduct upon which a disqualification for benefits must be based. See 871 IAC 24.32(8).

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

DECISION:

The claims representative's May 29, 2007, 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