IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHIRLEY K SHAULL
Claimant

OTTUMWA DEVELOPMENTS INC
OTTUMWA MANOR
Employer

APPEAL NO. 07A-UI-00466-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/10/06 R: 03
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Shirley Shaull filed a timely appeal from the January 9, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 30, 2007. Claimant participated. Director of Nursing Paula Thomas, R.N., represented the employer.

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: Shirley Shaull was employed by Ottumwa Manor as a full-time certified nursing assistant (C.N.A.) from July 26, 2005 until November 19, 2005, when Director of Nursing Paul Thomas, R.N., discharged her for attendance. The final absence that prompted the discharge occurred on November 17, when Ms. Shaull was absent and did not notify the employer. Ms. Shaull did not have a telephone. When Ms. Shaull needed to use the telephone, she would walk four blocks to a gas station. The telephone call from a gas station to the employer would be a local call. On November 17, Ms. Shaull decided not to walk to the gas station to use the telephone because she did not feel well and it was cold outside. Ms. Shaull felt well enough to make the four block trip to the gas station. Ms. Shaull lived in a house with two apartments, but did not contact her neighbor to see if the neighbor had a telephone she could use to contact the employer. Ms. Shaull had a roommate at the time, but did not make any attempt to have the roommate notify the employer she would need to be absent.

The employer had an attendance policy that is set forth in an employee handbook. Ms. Shaull received a copy of the handbook and signed a separate acknowledgment of the employer's attendance policy on July 26, 2005. Under the policy, Ms. Shaull was required to notify the employer at least two hours prior to scheduled start of her shift if she needed to be absent. The

employer also expected Ms. Shaull to find a replacement. Ms. Shaull was aware of the notification policy.

Ms. Shaull's prior absences were as follows. Ms. Shaull was absent due to illness on August 27 and 28, but on each day failed to notify the employer until late morning. On September 14, Ms. Shaull was two hours late and arrived with the smell of alcohol on her breath. On October 23, Ms. Shaull was absent and did not notify the employer. On November 8, Ms. Shaull was absent because she had been forced to vacate her apartment after her landlord discovered she had a cat. On November 13 and 14, Ms. Shaull was absent and did not notify the employer of the absence. On November 15, Ms. Shaull left work early due to illness. On November 16, Ms. Shaull was absent due to illness, but had notified the employer the evening of the 15th that she would not be at work following day.

On September 14, the employer issued a verbal warning to Ms. Shaull for tardiness and coming to work with the smell of alcohol on her breath. Ms. Shaull admitted to drinking the night before. On October 13, Ms. Shaull again arrived to work with the smell of alcohol on her breath, admitted to drinking the night before, and was sent home. On October 27, Ms. Shaull arrived at work a third time with the smell of alcohol on her breath and was confronted at the time of her arrival. At that time, Ms. Shaull announced she was leaving and left without being directed to do so.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Shaull was discharged for misconduct in connection with the employment. It does.

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 Ms. Shaull's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 administrative law judge concludes that the employer's records concerning Ms. Shaull's employment are more reliable than Ms. Shaull's recollection of events that took place more than a year ago. In addition, the evidence indicates that during the employment Ms. Shaull had an alcohol use/abuse problem that further calls into question her ability to accurately recall events that took place during her employment.

The greater weight of the evidence in the record establishes that the final "no call, no-show" absence on November 17 was an unexcused absences. The greater weight of the evidence establishes unexcused absences on August 27 and 28, September 14, October 13 23, and 27, and November 8, 13 and 14. The administrative law judge concludes that Ms. Shaull's unexcused absences were excessive. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Shaull was discharged for misconduct. Accordingly, Ms. Shaull is disqualified for benefits until she has worked in and

been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Shaull.

DECISION:

The Agency representative's January 9, 2007, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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