

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRENDA M JONES**  
Claimant

**APPEAL NO. 070-UI-11197-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GENESIS HEALTH SYSTEM**  
Employer

**OC: 09/16/07 R: 04  
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.43(3) – Rule of Two Affirmances

**STATEMENT OF THE CASE:**

Genesis Health System filed a timely appeal from the October 10, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 18, 2007. Claimant Brenda Jones participated. Craig Fields, Director of Human Resources, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Brenda Jones was employed by Genesis Health System as a full-time medical billing "Coder" from May 19, 1994 until September 13, 2007, when Patty Sallee, Manager of Operations, and Craig Fields, Director of Human Resources, discharged her for tardiness.

In May 2007, Ms. Sallee had commenced supervising the office where Ms. Jones worked. The employer determined that employee attendance practices were lax and took steps to bring the attendance practices into conformity with the employer's other offices and policy. Prior to Ms. Sallee's arrival, Ms. Jones had benefited from a "five-minute rule" that allowed her to be up to five minutes late without consequences. Prior to Ms. Sallee's arrival, Ms. Jones had benefited from a "flex rule" that allowed her to make up at the end of her shift any time she had missed at the beginning of the shift due to tardiness. In June, Ms. Sallee notified the employees, including Ms. Jones, that prompt attendance would be required. On August 31, Ms. Sallee notified the employees, including Ms. Jones, that a progressive discipline policy applicable to attendance would be enforced in the office. At the time Ms. Jones was discharged, the employer notified her that she was being discharged for her tenth tardiness in a

six-month period. However, soon after Ms. Sallee had taken over supervision of the office, Ms. Sallee had advised Ms. Jones that the employer was looking to eliminate her Coder position.

Ms. Sallee required that Ms. Jones report absences at least an hour before her shift by calling Ms. Sallee on her office line, cell phone, or home phone. Ms. Jones could either speak with Ms. Sallee or leave an appropriate message.

To clock in, Ms. Jones had to dial a designated telephone number and utilize an automated system. The system sometimes put Ms. Jones on hold prior to allowing her to clock in, which resulted in her clock in time being documented as later than she actually arrived or commenced the phone call.

The final instance of tardiness occurred on October 13, 2007, when Ms. Jones was tardy 30 minutes for personal reasons.

The employer considered additional attendance matters in making the decision to discharge Ms. Jones. Ms. Jones had no absences, tardiness, or early departures in March, April or May 2007. On June 1, Ms. Jones was absent because her husband's appendix had ruptured the night before and Ms. Jones had been at the hospital until 3:00 a.m. Ms. Jones had left a message for Ms. Sallee the night before the absence. Ms. Jones lived 30 minutes from the workplace and did not believe she could safely make it to work in light of her lack of sleep. On June 13, Ms. Jones was absent due to personal illness properly reported to the employer. The employer documented Ms. Jones as tardy on June 20 and 26, but the employer was unable to provide additional information. Ms. Jones recalls that she was a minute or two late on these days, according to the employer's time reporting system. On July 2, Ms. Jones was absent due to illness properly reported to the employer. On July 3 and 19, Ms. Jones was tardy for personal reasons. On July 23, Ms. Jones was absent for personal reasons. Four days prior, Ms. Jones had requested the day off so that she could be with her son and daughter-in-law as the daughter-in-law delivered a baby by Caesarian section. Ms. Jones learned at the last moment that her request for time off was denied. Ms. Jones called in an absence despite the denial of her request for time off. On August 1, Ms. Jones was one minute late because she was giving directions to a patient in the employer's parking lot. On August 6, the employer's time reporting system recorded Ms. Jones was one or two minutes late after it placed Ms. Jones on hold. On August 21, Ms. Jones was absent from work for personal reasons. Ms. Jones had traveled out-of-state and decided to extend her travel an additional day without approval from the employer. Ms. Jones was tardy for personal reasons on September 7 and 12.

Ms. Sallee issued written attendance warnings to Ms. Jones on August 24 and September 11. The September 11 warning was prompted by the tardiness on September 7.

Ms. Sallee continues in her employment with Genesis Health System, but did not participate in the appeal hearing.

Ms. Jones established a claim for benefits that was effective September 16, 2007 and has received benefits totaling \$4,094.00. Benefits were most recently disbursed for the benefit week that ended December 8, 2007. The claims representative's October 10, 2007, reference 01, decision allowing benefits was affirmed by a the decision entered by Administrative Law Judge Debra Wise on November 6, 2007 in Appeal Number 07A-UI-09758-DWT.

## 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 noted in the Findings of Fact, the employer did not present testimony from Ms. Sallee, the person from the employer who had the most first hand information about Ms. Jones' attendance matters.

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 evidence in the record establishes that the final tardiness on September 13 was an unexcused absence under the applicable law. The greater weight of the evidence establishes additional unexcused absences on July 3, 19, 23, August 21, September 7 and 12. The evidence indicates that the rest of the absences were excused absences under the applicable law, or not absences at all in instances where the employer's time reporting system caused delays in recording Ms. Jones' arrival time. The evidence in the record is sufficient to establish that Ms. Jones' unexcused absences were excessive. The evidence indicates that the absences occurred after the employer made clear its expectation that Ms. Jones would promptly arrive for work. The final two instances of tardiness occurred in the days immediately following the second written warning for attendance.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Jones was discharged for misconduct. Accordingly, Ms. Jones 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. Jones.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Workforce Development rule 871 IAC 24.43(3) provides as follows:

Rule of two affirmances.

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.

(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.

(3) No overpayment shall accrue to the claimant because of payment made prior to and during the period in which the department is processing the reversal decision.

Because Administrative Law Judge Debra Wise affirmed the initial decision allowing benefits, there is no overpayment of benefits. However, benefits will cease as of the entry of the present decision.

**DECISION:**

The Agency representative's October 10, 2007, reference 01, decision is reversed. 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. The employer's account will not be charged. Pursuant to the rule of two affirmances, there is no overpayment. However, benefits will cease as the entry of the present decision.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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